Petition

81-1591

No. _____

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1981

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

VISHIPCO LINE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, N. Y. 10005
(212) 530-5000
Counsel for Petitioner,
The Chase Manhattan Bank, N.A.

Of Counsel:
ANDREW J. CONNICK
TONI C. LICHSTEIN
PAUL T. SHOEMAKER
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, N. Y. 10005

February 26, 1982

QUESTION PRESENTED FOR REVIEW

When a foreign governmental authority confiscates the foreign branch of a U.S. bank and its assets and assumes the branch deposit obligations, does the act of state doctrine require American courts to give effect to such confiscation and assumption of obligations as a bar to a claim by foreign nationals against the bank's head office for payment of a foreign currency deposit payable only at the foreign branch?

The names of all parties are set forth in the caption.

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Vishipco Line, Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., Vn Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai, and Nguyen Thi Cham,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Chase Manhattan Bank, N.A. ("Chase"), prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit entered on September 29, 1981, insofar as that opinion and order reversed the judgment of the United States District Court for the Southern District of New York dismissing the complaint after trial to the Court.

Opinions Below

The opinion and order of the Court of Appeals, officially reported at 660 F.2d 854 (1981), is annexed as Appendix A. The opinion of the District Court dismissing respondents' claims after trial, which is not officially reported, is annexed as Appendix B. Two opinions of the District Court on pretrial motions, which are not officially reported, are annexed as Appendices C and D.

Jurisdiction

The opinion and order of the Court of Appeals for the Second Circuit was entered on September 29, 1981. A petition for rehearing and rehearing in banc was denied without opinion on November 30, 1981 (Appendix E). This petition is being filed within ninety days of November 30, 1981. The Court has jurisdiction to review the opinion and order of the Court of Appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are Article II, §§ 1 and 2, and Article III. The statute involved is a decree issued by the Provisional Revolutionary Government of South Vietnam ("revolutionary government") on May 1, 1975. The texts of the constitutional provisions and decree are reproduced in Appendix F.

Statement of The Case

A. *Prior Proceedings*

This action was commenced in March, 1977, in the United States District Court for the Southern District of New York, to recover from Chase's head office, among other things, the value of certain Vietnamese piastre deposits made by Vietnamese nationals at Chase's former branch in Saigon, South Vietnam, before the capture of Saigon

by revolutionary forces in April 1975. The complaint failed to allege the basis of the District Court's jurisdiction. Chase admitted the piastre deposits at the Saigon branch but denied liability on the grounds, among others, that under the act of state doctrine, the confiscation of the branch and its assets and the assumption of the branch's deposit liabilities by the revolutionary government pursuant to decree precluded the claims of Vietnamese nationals to recover from the head office foreign currency deposits payable only at the Saigon branch.

After a trial, the District Court (Carter, J.) dismissed all claims against Chase. It concluded, in substance: a) that respondents had no claims against Chase because their property, including the piastre deposits, had been nationalized by the revolutionary government in 1975, and b) that Chase had no liability for the deposits because war conditions required the closing of its Saigon branch in April 1975 and thereafter the revolutionary government took over and operated the banking business in that country.

On appeal, the Court of Appeals held that Chase's head office was liable for the deposits. It reasoned that when Chase suspended the operations of its Saigon branch in April 1975, in the face of the revolutionary take-over, the obligation for branch deposits "sprang" from Vietnam to Chase in New York; that the situs of the deposits was not in Vietnam at the time of the revolutionary government's nationalization of banks; and that therefore the obligation to repay the deposits was not affected by the nationalization. It also determined that although it was not pleaded, jurisdiction was based on diversity and thus the New York "breach day", rather than the federal "judgment day", rule should govern the determination of the dollar value which respondents were entitled to receive for their piastre deposits. It remanded the action to the District Court for a determination of the value of the Vietnamese piastre on the date of the closing of the Saigon branch. Chase's subsequent petition for rehearing and rehearing in banc was denied.

B. *Statement of Facts*

From 1966 until April 24, 1975, Chase operated a branch in Saigon (A529-A532, A186*). The individual respondent (Nguyen Thi Cham) held a piastre certificate of deposit issued by the branch and payable at the branch on May 27, 1975 (A276). The other respondents were Vietnamese corporations and maintained demand piastre deposit accounts at the branch (A24a). All respondents' deposits were made at Chase's former Saigon branch in the currency of South Vietnam, the piastre, and were payable under Vietnamese law solely in Saigon in piastres (A242).

Each depositor agreed as follows with respect to piastre deposits at the Saigon branch:

> In accepting this deposit, the Bank assumes no responsibility or liability for any losses to the depositor arising out of delays in or interruptions of the Bank's business due to Acts of God, acts of governmental authority, acts of public enemy or due to war, riots, fires, floods, civil commotions, insurrections, labor difficulties (including, but not limited to, strikes and other work stoppages and slowdowns), severe or adverse weather conditions, or causes beyond the Bank's control.

(A24a). In addition, the deposit slips used to make piastre deposits incorporated the Rules for Accounts of the Saigon branch, which stated that: "The account holder shall bear the risks resulting from . . . present or future legal provisions promulgated by the state where the account is kept" (A572). The certificate of deposit explicitly provided that it was payable at the Saigon office (A276).

In April 1975 the military situation in Vietnam rapidly deteriorated, and it became apparent that Saigon would

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* ("A") references are to the Joint Appendix in the Court of Appeals.

soon fall to the revolutionary forces (A536-A543). Extreme repressive measures by the invading forces against Americans and South Vietnamese associated with Americans were anticipated (A163). On April 23, 1975, Chase's branch was advised by the U.S. Embassy that space on an aircraft would be available the following day to evacuate the branch's employees and their families (A185). The branch operations were suspended at noon on April 24, 1975 (A186), and the branch employees were evacuated thereafter.

When the branch suspended operations, branch officers deposited with the French Embassy in Saigon the combinations and keys to the locks of the vaults of the branch and a set of the branch records (A158-A159, A552, A553). These steps were taken because it was anticipated that French officials would be permitted by the revolutionary government to remain in Saigon, and thus the interests of the branch's customers would be protected (A159). No assets of the branch were removed from Saigon (A160).

Saigon fell on April 30, 1975. On May 1, 1975, the revolutionary government issued a decree which provided in relevant part (A548-A549):

> All public offices, public organs, barracks, industrial, agricultural and commercial establishments, banks, communication and transport, cultural, educational and health establishments, warehouses and so forth—together with documents, files, property and technical means of U.S. imperialism and the Saigon administration—will be confiscated and, from now on, managed by the revolutionary administration.

By force of this decree, all of the former private banks in South Vietnam were nationalized (A548-A551, A588) and the entire banking function assumed by the revolutionary government (A250-A251, A270-A271). Since that time, the banks have in fact been operated by the revolu-

tionary government, which has assumed the banks' deposit obligations and made payments thereon (A270-A271).

Reasons for Allowance of the Writ

The decision below decided a federal question in a way which conflicts with the applicable decisions of this Court.

At issue is whether the act of state doctrine of federal law requires recognition of the expropriation of a foreign branch of a U.S. bank and its assets and of the assumption of branch deposit obligations by the foreign governmental authority as a bar to the imposition of liability on the bank's head office for branch deposits. The Court of Appeals decision ignores and thereby circumvents that doctrine, depriving U.S. banks of the protection traditionally afforded by the doctrine in cases involving expropriation. In reaching its unprecedented decision, the Court departed from prior law, including one of its own decisions. By adopting a novel theory of shifting situs for branch deposits and failing to apply fundamental principles with respect to the situs of such deposits, it asserted a rule which for the first time makes U.S. banks operating abroad guarantors of foreign currency deposits made by foreigners in foreign branches despite confiscation of such branches and assumption of their deposit liabilities by foreign governments.

The decision in effect imposes double liability on U.S. banks for foreign branch deposits confiscated by a foreign government. It thus exposes existing branches to greater risks than those contemplated when they were established. The decision will undoubtedly limit the ability and willingness of U.S. banks to operate and compete abroad, to the detriment of the U.S. international banking system and of American foreign trade and commerce.

ARGUMENT

The Court of Appeals' determination, based on its novel theory of "springing" situs of debt, results in the circumvention of the act of state doctrine—a doctrine founded on "the proper distribution of functions between the judicial and political branches of the government on matters bear-

ing upon foreign affairs". *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-28 (1964). Moreover, it conflicts with the teaching of decisions of this Court which have applied the doctrine to situations involving intangible property such as corporate debt. *See United States* v. *Belmont*, 301 U.S. 324 (1937). *Cf. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976). In *Belmont* this Court determined that a right to a bank deposit had been nationalized by the Soviet government, and subsequently assigned to the U.S. government, and that the act of state doctrine mandated recognition of the nationalization despite any contrary domestic policy considerations. In *Dunhill* this Court recognized the validity of the nationalization by Cuba of property in Cuba of Cuban cigar manufacturers whose businesses were confiscated by the Castro government. The Court of Appeals decision is clearly repugnant to these determinations.

Under the "springing" situs notion, when the Saigon branch operations were suspended the branch deposit relationships were extinguished in Vietnam, and their situs was immediately transferred to Chase's head office in New York. Thus, when days later the new regime took over the banking function in South Vietnam and assumed deposit liabilities of former banking entities such as the Chase branch, there were no deposit liabilities to be assumed by the regime; they had all "sprung" to New York.

Aside from being contrary to the contracts between the parties, this new theory of deposit "situs" evades the act of state doctrine. It thereby deprives Chase of the defense traditionally available in situations where liability is sought to be imposed in the United States in respect of a deposit relationship which has been assumed by a foreign sovereign. This circumvention undermines the basic objective the act of state doctrine seeks to achieve: recognition and effect in American courts for the acts of a foreign sovereign accomplished within its own territory. *See, e.g., Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897).

The deposit contracts with Chase's Saigon branch provided, in essence, for the payment of the deposits in piastres in Saigon in accordance with local law subject to, among other things, *force majeure* and the acts of local governmental authorities (A24a, A572). Under Vietnamese law, Chase's branch deposit obligations were excused, not extinguished as determined by the Court of Appeals, by reason of the war conditions requiring the closing of the branch (A24a, A235-A236). Under Vietnamese law, Chase's liability for branch deposit obligations was extinguished by the new governmental regime's take-over of all banking operations (A250-A251). In addition to the contracts between the parties and the Vietnamese law which they incorporated, all other relevant factors show that the situs of the deposit relationships was intended to be and remain in Vietnam. For example, all deposits were made in Vietnam in Vietnamese currency, the branch and its records were and are located in Vietnam, the branch was subject to regulation by Vietnamese authorities, and the depositors were Vietnamese nationals (A24-A24a, A146, A552-A553).

In similar situations, under the act of state doctrine, United States courts have recognized the effect of a foreign expropriation by concluding that the head office in the United States is not liable for the obligations of the business expropriated. The Court of Appeals ignored such precedent, including one of its own decisions, and relied on totally inapposite authority in failing to apply the act of state doctrine.

The Court of Appeals' sole judicial authority for imposing liability was *Sokoloff* v. *National City Bank*, 239 N.Y. 158 (1924). *Sokoloff* involved a contract entered into in New York pursuant to which the defendant bank agreed to pay rubles to plaintiff in Russia in consideration of a payment to the bank of U.S. dollars in New York. It was held that the bank breached that contract. The distinction

between the *Sokoloff* facts and the facts of this case is clear. At issue here is the liability of a national bank's head office for a deposit contract made in a foreign country, subject to the laws of that country, and performable in that country in the local currency. In effect by applying *Sokoloff* to the present facts, the Court of Appeals rewrote the contract between Chase and its Vietnamese depositors to enlarge Chase's obligations thereunder. Such a result was not only unjustified by the facts but at odds with the law as expressed by the Court of Appeals and the New York courts.

In its opinion the Court of Appeals failed to mention its own decision in *Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir.), *cert. denied*, 314 U.S. 650 (1941). That case held that the head office of a U.S. bank was not liable for obligations of a foreign branch after its confiscation by the Russian government. A similar result was reached by the New York Court of Appeals in a case involving a Russian branch of an American insurance company. *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71 (1934). *See also Dougherty* v. *National City Bank*, 157 Misc. 849 (Sup. Ct. Nassau Co. 1935).

In its decision, the New York Court of Appeals in *Dougherty* v. *Equitable* distinguished *Sokoloff*, noting that *Sokoloff* was one of several earlier cases which "had to do with contracts made out of Russia, most of them contracts made in New York to be governed by New York law". It stressed that, as with any opinion, *Sokoloff* must be "confined to the facts before the Court", pointing out again that it "related to a deposit made in the National City Bank in the city of New York, governed solely by New York law." 266 N.Y. at 88.

In *Dougherty* v. *Equitable*, on the other hand, the Court of Appeals, noting that "not only was the contract of insurance made in Russia, but all premiums were to be

paid in rubles in Russia at the St. Petersburg office of the defendant", applied the Soviet decrees nationalizing all insurance companies to bar recovery by appellants. 266 N.Y. at 80. The Court explained that:

> The right to collect money by a Russian citizen on a contract to be interpreted according to Russian law is no different . . . than the right to tangible property in Russia or the possession thereof. Both rights are dependent upon the law of Russia.

266 N.Y. at 87-88.

The distinction between the situation presented in *Sokoloff* and the one here is also apparent from the well-considered ruling in *Dougherty* v. *National City Bank*. That case involved four actions to recover the unpaid balance of rubles in each of four deposit accounts maintained at branches of a U.S. bank in Russia. For the three actions involving accounts opened by the deposit of rubles in Russia, the referee followed *Dougherty* v. *Equitable* and held that the decrees of the Soviet government extinguished the defendant bank's obligation to its Russian depositors. For the fourth action, however, in which the account was opened by the deposit of dollars in New York, the referee noted that "the facts were practically identical with those presented in the first *Sokoloff* case . . . ," 157 Misc. at 863, and accordingly felt bound to follow that case in holding that the Soviet confiscation decrees did not provide a sufficient defense for the bank.

The Court of Appeals for the Second Circuit in *Tillman* v. *National City Bank, supra,* not only adopted *Dougherty* v. *National City Bank,* but also affirmed the trial court's judgment for defendant on the merits. In so doing, the Court held that the Russian decrees released the head office of the U.S. bank from liability for the ruble accounts which were the subject of the *Tillman* action:

The Claim was discharged by the Russian decrees and acts.

> This has been held in many decisions. *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 193 N.E. 897; *Dougherty* v. *National City Bank*, 157 Misc. 849, 285 N.Y.S. 491; *United States* v. *Belmont*, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134; *Zimmermann* v. *Sutherland*, 274 U.S. 253, 255, 47 S.Ct. 625, 71 L.Ed. 1034 . . . . We have no reason to suppose that any right to resort to the defendant's New York office for payment of the plaintiff's claim survived the involuntary novation which under the Russian law substituted a government agency as debtor for the defendant.

118 F.2d at 635-36.

The decision below has the effect of enlarging the obligation of an American bank's head office and making it coextensive with that of its foreign branch. The result is effectively to write out of the deposit contract the limitations agreed to by the parties as to the place and manner of performance, excuse of performance by reason of *force majeure*, and other similar terms. The decision thus ignores the principle that a court may not rewrite the contract of the parties or enlarge their obligations thereunder by applying a law other than that under which the contract was created. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934); *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 407-08 (1930); *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517, 519 (1926); *Dougherty* v. *Equitable Life Assurance Society, supra*, 266 N.Y. at 78-81.

By ignoring long standing authority and creating a new theory of "springing" situs of debt, and thus rewriting the deposit contracts, the Court of Appeals stripped away the reasonable and justified protection afforded to American companies operating abroad by the act of state doctrine

and left Chase and other banks exposed to double liability for deposits in foreign branches confiscated by foreign governments.

Perhaps the Court of Appeals would have reached a different result if the revolutionary forces had taken over Saigon before Chase was compelled to suspend branch operations, for under those circumstances, no obligations would have had an opportunity to "spring" to the head office, and thus the nationalization would have been an effective act of state to relieve Chase of the Saigon deposit liabilities. Such a distinction is unsupportable as a matter of law or common sense. The record establishes that, by decree, the revolutionary government explicitly assumed control and management of all banking enterprises in the country (A548-A549) and that thereafter that government honored the deposits at former private banks and permitted withdrawals therefrom (A270-A271).

In this case, it is clear that the bank accounts were located in Vietnam and were seized by the new regime. Because of that seizure Chase should no longer be deemed the obligor with respect thereto.

The questions involved touch on the viability of the U.S. international banking system. By depriving victims of foreign expropriations of the protection traditionally afforded them pursuant to the act of state doctrine the decision below poses a direct and serious threat to that system, which could have significantly adverse, long-range consequences for American foreign trade and commerce. The importance of such issues and the conflict between the decision below and prior decisions of this Court warrant review of that decision by this Court.

CONCLUSION

The petition should be granted.

Dated: February 26, 1982

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, N. Y. 10005
(212) 530-5000

Counsel for Petitioner,
The Chase Manhattan Bank, N.A.

Of Counsel:

ANDREW J. CONNICK
TONI C. LICHSTEIN
PAUL T. SHOEMAKER
MILBANK, TWEED, HADLEY
& MCCLOY
1 Chase Manhattan Plaza
New York, N. Y. 10005

Appendix

APPENDIX A

Opinion of the United States Court of Appeals For The Second Circuit

Vishipco Line, Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., Vn Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai, and Nguyen Thi Cham,

Plaintiffs-Appellants,

v.

The Chase Manhattan Bank, N.A.,

Defendant-Appellee.

No. 1015, Docket 81-7052.

United States Court of Appeals,

Second Circuit.

Argued April 29, 1981.

Decided Sept. 29, 1981.

Arthur M. Boal, New York City (Arthur M. Boal, Jr., Boal, Doti & Larsen, New York City, of counsel), for plaintiffs-appellants.

Andrew J. Connick, New York City (Toni C. Lichstein, Paul T. Shoemaker, Milbank, Tweed, Hadley & McCloy, New York City, of counsel), for defendant-appellee.

Before LUMBARD, MANSFIELD and VAN GRAAFEILAND, Circuit Judges.

MANSFIELD, Circuit Judge:

Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York entered after a non-jury trial by Judge Robert L. Carter on December 5, 1980, dismissing their claims against Chase Manhattan Bank, N.A. ("Chase"), for breach of contract. The ten corporate plaintiffs—Vishipco Line, Ha Nam Cong Ty, Dai Nam Hank Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., VN Tau Bien C.T., Van An Hang Hai C.T., and Cong Ty U Tau Sao Mai—are Vietnamese corporations which maintained piastre demand deposit accounts at Chase's Saigon branch in 1975. Invoking diversity jurisdiction, they claim that Chase breached its deposit contracts with them when it closed the doors of its Saigon branch on April 24, 1975, to escape from the Communist insurgents and subsequently refused to make payment in New York of the amount owed. The individual plaintiff—Ms. Nguyen Thi Cham—is a Vietnamese citizen who purchased a six-month two hundred million piastre certificate of deposit ("CD") from Chase's Saigon branch on November 27, 1974, and claims that Chase is in breach for refusing to cash the CD in dollars in New York.

We reverse. Chase was clearly obligated to pay plaintiffs the amounts it owned them. None of the affirmative defenses raised by Chase to its conceded obligations to plaintiffs can be sustained. Under Rule 44.1, plaintiffs' failure to introduce evidence of their right to recovery under Vietnamese law governing deposit obligations is not a ground for dismissal of their claims. The evidence was sufficient to give Tran Dinh Truong standing to represent the corporate plaintiffs in this lawsuit. The record does not support Chase's claim that the new Vietnamese government became the successor in interest to the corporate plaintiffs or that the individual plaintiff Ms. Nguyen Thi

Cham is disqualified from bringing her action because the funds used to buy her CD may not have been her own. Chase's defenses of impossibility and *force majeure* fail because it remained liable to discharge obligations incurred through its branch, which were never assumed by the new Vietnamese government. The present worthlessness of the South Vietnamese piastre is no barrier to recovery. Under New York law which governs, the dollar value of Chase's obligation to the corporate plaintiffs must be determined as of the date when it closed its branch without giving them the opportunity to withdraw sums owed them rather than the date of judgment. The individual plaintiff, Ms. Cham, is entitled to recover the value in dollars of her CD on its due date.

From 1966 until April 24, 1975, Chase operated a branch office in Saigon. Among its depositors were the ten corporate plaintiffs, which were principally engaged at that time in providing shipping services to the U.S. Government in Southeast Asia, and the individual plaintiff, who owned a 200 million piastre CD issued by Chase's Saigon branch. Chase's operations in Saigon came to an end at noon on April 24, 1975, after Chase officials in New York determined that Saigon would soon fall to the Communists. After closing the branch without any prior notice to depositors, local Chase officials balanced the day's books, shut the vaults and the building itself, and delivered keys and financial records needed to operate the branch to personnel at the French Embassy in Saigon. Saigon fell on April 30th, and on May 1st the new government issued a communique which read as follows:

> All public offices, public organs, barracks, industrial, agricultural and commercial establishments, banks, communication and transport, cultural, educational and health establishments, warehouses, and so forth—together with documents, files, property and technical means of U.S. imperialism and the Saigon administra-

tion—will be confiscated and, from now on, managed by the revolutionary administration.

Shortly thereafter, the French embassy turned over records from the Chase branch to the new government.

Tran Dinh Truong, who is a major shareholder of most, if not all, of the ten corporate plaintiffs and who represents them here, fled South Vietnam just prior to the Communist takeover, as did Nguyen Thi Cham, the individual plaintiff. After arriving in the United States, Truong and Cham demanded that Chase repay the piastre deposits made in Saigon, but Chase refused to do so. Invoking diversity jurisdiction Truong, acting under his powers of attorney, subsequently caused the plaintiffs to bring this action against Chase for breach of contract, seeking recovery of the dollar value of the piastre deposits held by its Saigon branch for them at the time it was closed, as well as the value of the certificate of deposit owned by Cham.[1]

Chase, admitting that plaintiffs had made the alleged deposits in its Saigon branch, interposed a series of affirmative defenses as grounds for denial of recovery including claims that 1) the seizure of Chase's former branch in South Vietnam by the dominant authorities in North Vietnam relieved Chase of any liability to plaintiffs, 2) Chase could not be held liable since the piastre accounts for which plaintiffs sought recovery were payable only in piastres at its Saigon branch, 3) plaintiffs lacked standing to assert their claims, and 4) payment of the claims would be illegal and is barred by Foreign Asset Control Regulations. With respect to the individual claim asserted by Nguyen Thi Cham, Chase added as a defense that the obligation of its Saigon branch had been assumed by the Government of Vietnam.

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[1] A further claim made below by the corporate plaintiffs to recover the value of nine ships seized in Saigon harbor is not advanced on this appeal, and hence will not be discussed.

The evidence was undisputed that on April 24, 1975, the ten corporate plaintiffs held demand piastre deposits (or overdrafts) with Chase in the following sums:

Name of Account	*Balance*
Vishipco Line	VN $22,995,328
Ha Nam Cong Ty	9,053,016
Dai Nam Hang Hai C.T.	9,397,598
Rang Dong Hang Hai C.T.	8,974,556
Mekong Ship Co. Sarl	7,239,661
Vishipco Sarl	(12,498,573)
Thai Binh C.T.	68,218
VN Tau Bien C.T.	5,925,249
Van An Hang Hai C.T.	87,439,199
Cong Ty U Tau Sao Mai	380,419

Chase also concedes that on November 27, 1974, it issued to Ms. Cham a CD in the sum of 200,000,000 Vietnamese piastres, payable on May 27, 1975, and that the CD bore interest at the rate of 23.5% per annum, payable at maturity.

The district court, after hearing the evidence without a jury, dismissed the action. It held that Vietnamese law controlled the disposition of the case, in light of the extensive contacts which the depository relationships had with Vietnam and its conclusion that "the real defendant in this case is not Chase in New York but Chase's former branch bank in Saigon." The court criticized plaintiffs for not presenting any evidence of Vietnamese law giving them a right to recover and noted that such a failure had properly been held to justify dismissal in the past. However, it reached the merits because Chase, in support of its affirmative defenses, had "shouldered plaintiffs' burden" and put in some evidence of Vietnamese law relating to those defenses.

Chase first argued that Tran Dinh Truong lacked standing and capacity to bring this action in the name of the corporate plaintiffs. The court found, after hearing expert testimony on the subject, that under Vietnamese law only the manager or one holding a general power of attorney could sue on behalf of a Vietnamese corporation. Truong, as manager of Dai Nam Hang Hai C.T., had standing to sue on its behalf, but could only do so for the other nine plaintiff corporations if he could show that he held valid general powers of attorney from them. Plaintiffs did introduce into evidence two sets of powers of attorney, upon which they relied. The first set, involving four of the corporate plaintiffs (Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai, and Vishipco Sarl), was issued on October 22, 1970, in a letter to the Director of Chase's Saigon branch, who had requested that the five corporations then entering into a credit agreement with Chase (one of which, Cuu Long Hang Hai C.T., is not a party here) authorize Mr. Truong to act on their behalf. This letter, signed by the corporate shareholders, contained the following language:

> All those above-mentioned companies are founded [sic] 100% by our capital. We confirm that Mr. TRAN DINH TRUONG is designated as General Director of these Companies with unlimited general power to deal and borrow and lend monies. Signing contracts with your Bank—MR. TRAN DINH TRUONG is fully empowered to sign alone without needing a second signature to use these accounts as well as to negotiate the credit provision for the above-mentioned companies.

The second set of powers of attorney, involving six of the corporate plaintiffs (Ha Nam Cong Ty, Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Thai Binh C.T., VN Tau Bien C.T., and Van An Hang Hai C.T.), was executed and dated April 1, 1975, and each granted Mr. Truong authority "to act on behalf of the company, with full power,

in the management and operation of the said company." While we have been unable to locate in the record any power of attorney relating specifically to Vishipco Line, there is evidence in the October 22, 1970, letter to Chase that the Vishipco Line account was a global account owned collectively by the other corporate plaintiffs, and therefore could presumably be drawn upon by them acting jointly.

Despite these written powers of attorney the court found that Truong did not have authority to bring this action because he testified that his powers had not been published in the official gazette, as required by Vietnamese law. According to the court, the absence of publication made "Truong's purported authority . . . subject to challenge by shareholder[s] of the corporation and the manager." The court therefore held that Truong only had standing to sue on behalf of Dai Nam Hang Hai C.T. Even this possibility was eliminated, however, when the court went on to find that

> the communist regime in Vietnam has taken over the maritime transport industry of which the plaintiff corporations were a part, and thus, the Vietnamese government is the successor in interest to plaintiff corporations [reference omitted]. Indeed, the plaintiff corporations no longer have any legal existence since under current Vietnamese law private maritime corporations have been abolished.

Since Dai Nam Hang Hai C.T., in the district court's view, had been abolished by the new regime, Judge Carter held that Truong could not bring suit on its behalf either. "The plaintiff corporations are no longer viable entities and have no standing to sue in this court."

The court then addressed Chase's defense of impossibility and *force majeure*, and found that under Vietnamese law a bank would not be held liable to a depositor for losses suffered because of events of the type which forced Chase to close the doors of its Saigon branch on April 24th.

It further held that the corporate plaintiffs' claims were flawed by their failure to show that a valid demand to withdraw funds had been made prior to April 24th. Moreover, according to the court, all property abandoned in Vietnam by those who fled in advance of the communists was confiscated by the new government, and the act of state doctrine put that confiscation beyond judicial examination.

As far as plaintiff Cham's claim was concerned, the district court held that Chase could not refuse to pay merely because the original purchase was made by Cham with funds which were not her own. It went on to hold, however, that Chase was not required to pay Cham before April 24, 1975, since the CD did not mature until some weeks later, and that by the time it had matured Chase had been replaced as debtor by the state, which now had the sole authority to decide what if any part of her deposit Cham could claim. In the district court's words: "The communist regime has appropriated the assets of Chase's Saigon branch and confiscated Cham's property. She has no claim against defendant."

DISCUSSION

Chase here first contends that plaintiffs' claims were dismissible for failure to prove that under Vietnamese law they were entitled to recover. We disagree. The district court largely agreed with Chase's contention, stating:

> When foreign law is an issue in a case, that law must be proved as a fact. *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 396–97, 69 S.Ct. 622, 627–28, 93 L.Ed. 754 (1949); *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274 (1912); *Walton* v. *Arabian American Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872, 77 S.Ct. 97, 1 L.Ed.2d 77 (1956). Plaintiffs, however, presented no evidence concerning the law of Vietnam. Such failure has resulted in dismissal of a plaintiff's claims. See

> *e. g., Ozanic* v. *United States*, 165 F.2d 738 (2d Cir. 1948); *McQuade* v. *Compania de Vapores San Antonio, S. A.*, 131 F.Supp. 365 (S.D.N.Y. 1955) (Goddard, J.). However, since defendant has shouldered plaintiffs' burden and offered proof of Vietnamese law, there is no need to dismiss for lack of evidence on which to determine Vietnamese law.

Although this statement reflects the law as it existed prior to the adoption of Rule 44.1 F.R.Civ.P. in 1966, it no longer governs the manner in which questions of foreign law are to be dealt with in the federal courts. Prior to 1966 foreign law questions were regarded as questions of fact, 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2441 (1971), and, as the district court's citations indicate, a number of courts took the position that a failure to prove foreign law was fatal to a claim, even if the parties had not raised the issue of the applicability of foreign law on their own. Even in this state of the law, however, federal courts frequently refused to dismiss where they were sitting in a state which provided for judicial notice of foreign law. See, e. g., *Siegelman* v. *Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955). See generally 2A *Moore's Federal Practice* ¶ 8.17 [9.1].

Rule 44.1 of the Federal Rules of Civil Procedure,[2] which became effective in 1966, put to rest the idea that foreign law is a question of fact which has to be proven by the claimant in order to recover. It declared that "[t]he court's determination shall be treated as a ruling on a question of law."

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[2] Rule 44.1, Fed.R.Civ.P., reads as follows:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Chase nevertheless contends that even under the more liberal standards of Rule 44.1, plaintiff's claims should have been dismissed for failure to provide evidence of foreign law after it became clear that under New York's choice of law rules the entire case would normally be governed by Vietnamese law.

This assumes that the forum's choice of law rules are mandatory rather than permissive. See generally Sass, *Foreign Law in Federal Courts*, 29 Am.J.Comp.L. 97, 103-07 (1981). However, with the decline of the vested rights theory, see Currie, *On the Displacement of the Law of the Forum*, 58 Colum.L.Rev. 964, 1001 (1958), the movement has been away from a mandatory application of the forum's choice of law rules and toward the adoption of a discretionary rule. While, as the Advisory Committee's notes to Rule 44.1 make clear, a court is still permitted to apply foreign law even if not requested by a party, we believe that the law of the forum may be applied here, where the parties did not at trial take the position that plaintiffs were required to prove their claims under Vietnamese law, even though the forum's choice of law rules would have called for the application of foreign law. This reflects the view adopted by ourselves and other federal courts since 1966. See, e. g., *Commerical Insurance Co.* v. *Pacific-Peru Construction Corp.*, 558 F.2d 948, 952 (9th Cir. 1977); *Bartsch* v. *Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n.3 (2d Cir.), *cert. denied*, 393 U.S. 826, 89 S.Ct. 86, 21 L.Ed.2d 96 (1968); *Morse Electro Products Corp.* v. *S.S. Great Peace*, 437 F.Supp. 474, 487-88 (D.N.J. 1977).

While Chase invoked foreign law under Rule 44.1 with respect to its own affirmative defenses only, neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit. Nor did Chase ever suggest that under Vietnamese law those obligations would not have formed a basis for re-

covery. Therefore, while Vietnamese law as invoked by Chase will be applied to those affirmative defenses which rest on Vietnamese law, the parties' failure to invoke foreign law with respect to the underlying obligations themselves would not mandate dismissal of the claims. Under New York law it is clear that, unless relieved of liability under one or more of the affirmative defenses asserted by it, Chase was obligated under its contracts with plaintiffs to pay them the amounts deposited with it.

Turning to Chase's affirmative defenses, it first argues that the actions brought on behalf of nine of the ten corporate plaintiffs must be dismissed because Tran Dinh Truong, who purports to represent them, has no authority under Vietnamese law to bring suit on their behalf. Chase's Vietnamese law experts, Ta Van Tai, testified that prior to April 30, 1975, only the manager or one who had been granted a general power of attorney could initiate suit on behalf of limited liability corporations such as the corporate plaintiffs. Since Truong is concededly the manager of Dai Nam Hang Hai C.T., that company's action could not be dismissed on this ground. But Chase contends that the other nine corporate plaintiffs should be dismissed, because Truong does not hold the post of manager in any of them. Despite the general powers of attorney granted to Truong by at least some of these nine corporate plaintiffs, Chase argues that these attempted transfers of authority were invalid under Vietnamese law because they were not published in the official gazette.

We disagree. The purpose of the requirement that general powers of attorney be published in the local gazette and otherwise be given special publicity is to give notice to the general public that the acts of the former manager are no longer valid and that the attorney-in-fact is now in a position to bind the corporation. The testimony at trial was that, when publication did not take place, the holder of the power of attorney could be challenged by third

parties, at which time he would "have to present some kind of proof that he is authorized by all the shareholders" to do what he is seeking to do. Since this power to challenge the attorney-in-fact would help prevent the corporation from being injured by "that person who claim[s] to represent the corporation [but who] may act unwisely," it serves as a useful safeguard to protect the interests of the shareholders. However, failure to publish a general power of attorney in the gazette renders the attorney-in-fact's authority merely voidable, not void. Once his power to act has been challenged, he may defeat that challenge by proving that he has in fact been properly authorized by the stockholders to act on their behalf. Chase has been unable to introduce any evidence which would cast doubt on the validity of the powers of attorney executed on Truong's behalf. There is no indication that Truong's actions here are other than in the interest of the corporate plaintiffs and their shareholders.

The failure to publish should not therefore be considered fatal. This basic principle is especially appropriate in the present case, since four of the corporate plaintiffs conferred their general powers of attorney on Truong *at Chase's own request.* After requiring that Truong be authorized to act on behalf of these corporations before engaging in financial dealings with them and after relying on those powers of attorney for years, Chase can hardly be heard to challenge the validity of those instruments now. Therefore, with the possible exceptions of Cong Ty U Tau Sao Mai (which does not appear to have granted any power of attorney to Mr. Truong) and Vishipco Line (as to which further proof is required), Mr. Truong had authority to bring these actions on behalf of the corporate plaintiffs.[3]

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[3] Plaintiffs argue on appeal that Chase's defense of lack of capacity was not pleaded with the specificity required by Fed.R.Civ.P. 9(a). Chase argues that it was raised and in the alternative that plaintiffs'

Chase's next affirmative defense is that the plaintiff corporations have been nationalized by the Vietnamese government and therefore cannot sue on their own behalf. The district court agreed with Chase on this point, asserting that "the Vietnamese government is the successor in interest to plaintiff corporations" and that "the real defendant in this case is not Chase in New York but Chase's former branch bank in Saigon." We find the evidence of record insufficient to support these statements. In order to hold that the Vietnamese government has succeeded to the interests of the corporate plaintiffs, it must be found that the government stepped into the shoes of the corporate plaintiffs by formally assuming their assets and liabilities, thus replacing the former management. A showing that the government has merely confiscated those corporate assets which were left behind at the time of the evacuation is inadequate, since this does not constitute an assumption of the corporate mantle. A government which confiscates abandoned assets is no more the successor in interest to the departed corporation than a bank robber is to a bank victimized by him.

The evidence relied on by Chase does not support its assertions that the new government succeeded to the rights and obligations of the corporate plaintiffs and that plaintiffs no longer existed as independent entities. The testimony of Vietnamese law expert Tai on this issue was limited to the interpretation of the printed text of a radio broadcast from Hanoi discussing the governmental takeover of sea transport facilities after the fall of Saigon.

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failure to raise this issue below results in their being barred from raising it here. Since there is only one corporate plaintiff, Cong Ty U Tau Sao Mai, for which Truong failed completely to show he had any authority, the issue is largely academic. With respect to that corporation we are not persuaded, in view of Chase's affirmative defenses, that Chase's failure properly to plead lack of Truong's capacity amounted to a waiver of the defense.

As Tai correctly described the document, it merely announced

> the decision of the [insurgent] Saigon authorities to take over all maritime transportation facilities abandoned by the owners in South Vietnam and set up a state enterprise named the South Vietnam Maritime Transport Company.

Tai was asked to express his opinion "as to the present ownership of *assets* of maritime corporations which existed prior to April 30, 1975" (emphasis supplied), and answered that

> all maritime transport industry was monopolized—has been monopolized by the state. *In this sense,* all the private maritime transport corporations have been nationalized. (Emphasis supplied).

The record does not support the finding that the Vietnamese government became the successor in interest to the corporate plaintiffs. The evidence relied on is merely an announcement that abandoned assets of the maritime corporations had been seized, and that a new state company had been formed to operate them. This is wholly insufficient. There was no evidence that the Vietnamese government stepped into the corporate plaintiffs' shoes or altered in any way their corporate existence.

Chase next argues that the Vietnamese decree confiscating the assets which maritime corporations such as the corporate plaintiffs had left behind had the effect of seizing the piastre deposits at issue in this case. As a result, according to Chase, the corporate plaintiffs may not sue to recover the deposits because they no longer own them, and the act of state doctrine bars any challenge to the validity of the governmental seizure. We disagree. There is no evidence that plaintiffs' existence as corporate entities was terminated. Moreover, it is only by way of a strained read-

ing of the Vietnamese confiscation announcement that one can even argue that choses in action were meant to be included. The plain meaning of the statement that

> the Saigon-Gia Dinh Management Committee quickly took over the management of all maritime transportation *facilities abandoned by their owners* (emphasis supplied)

is that the seizures involved physical assets only and did not reach whatever claim the corporate plaintiffs might have on their departure for payment of the amounts owed to them by Chase.

More importantly, however, upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree. As we have said in the past, "[f]or purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it." *Menendez* v. *Saks and Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 2201, 48 L.Ed.2d 815 (1976). The rule announced in *Harris* v. *Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905), continues to be valid on this point: the power to enforce payment of a debt depends on jurisdiction over the debtor. Since Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs. As one qualified commentator has observed:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed, . . . the depositor has a claim against the home office; thus, the situs of the debt represented by the deposit would spring back and cling

> to the home office. If the situs of the debt ceased to be within the territorial jurisdiction of [the confiscating state] from the time the branch was closed, then at the time the confiscatory decree was promulgated, [the confiscating state would] no longer [have] sufficient jurisdiction over it to affect it. . . . [U]nder the act of state doctrine, the courts of the United States are not bound to give effect to foreign acts of state as to property outside the acting state's territorial jurisdiction. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 975 (1979) (footnotes omitted) "Heininger").

These principles have been recognized in New York. See *Manas y Pineiro* v. *Chase Manhattan Bank, N.A.*, 106 Misc.2d 660, 434 N.Y.S.2d 868 (Sup.Ct.N.Y.Cty.1980), where the court held that for the purpose of the act of state doctrine the situs of a debt depends on whether the parties and the *res* were in the foreign country at the time of confiscation. Since in our case Chase's branch in Saigon was neither open nor operating at the time of the confiscation and had in fact been abandoned prior to that time, the Vietnamese decree was ineffective as against Chase's debt to the plaintiffs.[4]

Chase's claim that Ms. Cham is without standing to maintain this action is frivolous and must be rejected, as it was by the district court. It may be true, as Chase alleges, that the piastres used by Cham to buy the CD did not belong to her but came instead from the account of one of the corporate plaintiffs. Nevertheless, the law is clear that under these circumstances a bank is barred from using this fact as a pretext for refusing to honor a CD:

> A bank which has received money from a customer and credited it to him on its books cannot be heard

[4] Neither *Manas* nor *Menendez* were cited to this Court by counsel despite the fact that Chase's counsel here and in *Manas* were the same.

> subsequently to allege that the deposit belonged to someone else, unless the entry was procured by fraud and the bank made it without knowledge of the material facts. 10 Am.Jur.2d *Banks and Banking* § 506 (1963).

Since Chase does not claim (and did not show below) that it was unaware of the source of funds which were invested in Cham's CD, its challenge to Cham's standing must be dismissed.

Chase next argues that under Vietnamese law its failure to repay plaintiffs' deposits in the period prior to May 1, 1975, was not a breach of its deposit contract, because the conditions prevailing in Saigon at the time rendered payment impossible. In support of this argument, Chase cites various sections of the South Vietnamese Civil Code which excuse performance under various extenuating circumstances, as well as the provisions included in the deposit contracts used by the Saigon branch which purported to discharge the bank's responsibility for losses to depositors resulting from a variety of unexpected and uncontrollable sources.

This argument must be rejected for the reasons that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch. As the official referee in the *Sokoloff* case (Harrison Tweed, of the Milbank Tweed firm) summarized the law:

> [W]hen considered with relation to the parent bank, [foreign branches] are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent

> bank, and are instrumentalities whereby the parent bank carries on its business. . . . *Ultimate liability for a debt of a branch would rest upon the parent bank. Sokoloff* v. *National City Bank*, 130 Misc. 66, 73, 224 N.Y.S. 102, 114 (Sup.Ct.N.Y.Cty.1927) (emphasis added).

U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank. Heininger, *supra*, at 911-12. Indeed, the national policy in South Vietnam, where foreign banks were permitted to operate only through branches, was to enable those depositing in foreign branches to gain more protection than they would have received had their money been deposited in locally incorporated subsidiaries of foreign banks. Chase's defenses of impossibility and *force majeure* might have succeeded if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office. But absent such circumstances the Saigon branch's admitted inability to perform did not relieve the Chase of liability on its debts in Saigon, since the conditions in Saigon were no bar to performance in New York or at other points outside of Vietnam. Nor has Chase shown that the Vietnamese government took steps to assume or cancel its branch liabilities.[5] The May 1st decree nationalizing the Vietnamese banking industry only provided that "[a]ll . . .

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[5] Chase's reliance on Judge Lehman's concurrence in *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 103, 193 N.E. 897 (1934), for the proposition that it is immaterial whether a foreign government seizes only a branch's assets or assumes its liabilities is misplaced. Judge Lehman's opinion in that case, while technically a concurrence, was in fact a dissent on this point, and his position has never received majority support in New York. The generally accepted view is to the contrary. See Heininger, *supra*, at 1016-17.

banks . . . will be confiscated and from now on managed by the revolutionary administration." In addition, during discovery Chase, in response to the following interrogatory:

> Interrogatory 4. When the assets were seized did the Government of Vietnam agree to pay the depositors at the Saigon Branch?

replied

> Chase lacks the knowledge necessary to answer this interrogatory.

The evidence therefore can only be read as showing that the Vietnamese government confiscated the assets abandoned by Chase in Saigon, but did not thereby affect Chase's liabilities to its depositors. Under these circumstances, Justice (then Judge) Cardozo's opinion in *Sokoloff* fifty years ago applies:

> The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. . . . Plaintiff did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. Everything in Russia might have been destroyed by fire or flood, by war or revolution, and still the defendant would have remained bound by its engagement. *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 167, 145 N.E. 917 (1924).

As one commentator has summarized the law:

> The defenses of frustration and impossibility were . . . rejected at an early stage in the *Sokoloff* proceedings, and do not appear to have been successfully raised in subsequent cases involving foreign branches of U.S.

banks. Rather, the well-established path from branch to home office has been followed, even if the branch has been closed, to establish an alternative means for performance. Heininger, *supra*, at 1003–04.

A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branch will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. See, e.g., *Sokoloff* v. *National City Bank*, *supra*, 130 Misc. at 71, 224 N.Y.S. at 112; Heininger, *supra*, at 1009–10. In the rare event that such measures are either impossible or only partially successful, fairness dictates that the parent bank be liable for those deposits which it was unable to return abroad. To hold otherwise would be to undermine the seriousness of its obligations to its depositors and under some circumstances (not necessarily present here) to gain a windfall.

Chase's next argument, that under New York law its non-payment must be excused because no demand was ever made prior to the closing of its Saigon branch, must also be rejected. No Vietnamese law was offered on this issue. Nor is Chase's contention supported by New York law. It is not settled that a demand is not necessary where the branch in which the deposit was maintained (or by which the CD was issued) has been closed. 10 Am.Jur.2d *Banks & Banking* § 450 (1963); *Sokoloff* v. *National City Bank*, 250 N.Y. 69, 80–81, 164 N.E. 745 (1928) (where Petrograd branch of National City Bank ceased to exist because of Soviet seizure, this made "demand useless and unnecessary" and no demand was required since it "would manifestly be futile"). Similarly, reliance on New York cases suspending or excusing performance during times of war fails, since Chase, which was ultimately liable for the debt,

was never barred by the wartime conditions in Vietnam from making payment outside of Vietnam. Finally, Chase, as a national bank, can find no comfort in the provisions of § 138 of the New York Banking Law, which purport to limit in various ways the liability of *state* bank and trust companies for deposits made in overseas branches. By its own terms, § 138 is unavailable to Chase in this case, because it only applies to state, not national, banks. If this unavailability has the effect of placing national banks like Chase at a competitive disadvantage vis-a-vis state banks, as Chase alleges, the solution lies with Congress, not the judiciary.

Chase argues that, even if all its other affirmative defenses fail, plaintiffs cannot recover because the judgment-day rule, under which obligations to pay foreign currencies (in this case piastres) must be converted prior to payment into dollars at the rate of exchange prevailing on the day judgment is entered, applies to this case and precludes any recovery, since the piastre is now worthless. We disagree. As a federal court sitting in diversity, we must apply the currency-conversion rule employed by the courts of New York, which has followed the breach-day rule for many years. Therefore, plaintiffs are entitled to recover an amount in dollars which reflects the exchange rate between dollars and South Vietnamese piastres at the time of breach, plus statutory interest.[6]

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[6] On remand, the district court will have the task of determining the exchange rate as of April 24, 1975, which should be utilized in converting the corporate plaintiffs' piastre deposits into dollars. There is evidence in the record that the official rate of exchange on April 24, 1975, was 755 piastres to the dollar. Chase will have the opportunity to introduce evidence showing that this rate was artificially low and should be replaced by a higher rate. See *Hughes Tool Co.* v. *United Artists Corp.*, 279 A.D. 417, 110 N.Y.S.2d 383 (1st Dep't 1952), *aff'd mem.*, 304 N.Y. 942, 110 N.E.2d 884 (1953). Statutory interest on the deposit accounts will be awarded on the dollar amount so found from April 24, 1975.

It is true that federal courts sitting in *non*-diversity cases have rather consistently adopted the judgment-day rule. See, e. g., *Zimmermann* v. *Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1927); *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926); *Conte* v. *Flota Mercante del Estado*, 277 F.2d 664, 670 (2d Cir. 1960); *Shaw, Savill, Albion & Co.* v. *The Fredericksburg*, 189 F.2d 952, 954–55 (2d Cir. 1951). However, this rule is substantive rather than procedural (there is no Federal Rule of Procedure on the subject) and therefore cannot be followed by federal courts sitting in diversity in states which apply the breach-day rule. See generally *Compania Engraw Commercial E. Industrial S.A.* v. *Schenley Distillers Corp.*, 181 F.2d 876, 879 (9th Cir. 1950). Absent a federal rule, see Ely *The Irrepressible Myth of Erie*, 87 Harv.L.Rev. 693, 698 (1974), the choice between con-

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With respect to Ms. Cham's CD, which became payable on May 27, 1975, the currency rate prevailing on that date, if one existed, may be used or, if none existed, the last rate in existence prior to that date, with interest from May 27. Here again Chase should have the opportunity to show that because of deterioration in the exchange value of the piastre a different rate should be adopted. The objective, of course, is to award just compensation for the breach. See *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 505 F.Supp. 412, 464 (S.D.N.Y.1980) (judgment-day rule), *affirmed with modification* 658 F.2d 875 (2d Cir. 1981).

We have not looked into the question of whether payment of any judgment would be subject to the terms of the foreign asset control provisions of the Trading With the Enemy Act, 50 App. §§ 3, 5 and regulations thereunder, 31 CFR § 500.201 (1980), and the issue has not been argued on this appeal. The record reveals, however, that the Federal Reserve Bank has issued licenses to Ms. Cham unblocking the balance owed by Chase to Ms. Cham on her CD and permitting its transfer to an interest-bearing account. If similar licenses are required before Chase may transfer funds to the corporate plaintiffs we anticipate that they will be afforded the opportunity to secure their issuance.

flicting state and federal practice must be made with a view toward fulfilling "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 44 L.Ed.2d 8 (1968). A plaintiff attempting to collect on an obligation denominated in a foreign currency that has appreciated significantly since the date the obligation was incurred would be tempted to forum-shop if he could rely on the federal courts to apply the judgment-day rule even in a diversity case. Conversely, a defendant faced with a state suit demanding payment of an obligation denominated in a currency that had depreciated significantly since the date it was incurred would be tempted to seek removal to a federal court whenever possible in order to utilize a federal judgment-day rule. *Hanna* must therefore be read as barring use of the federal judgment-rule here. In addition, it would be inequitable to allow a party to benefit or suffer from the existence of diversity jurisdiction in cases involving obligations denominated in foreign currencies when a similarly situated non-diverse party would not face such a consequence. See generally Morris, *English Judgments in Foreign Currency: A "Procedural" Revolution*, 41 Law & Contemp. Prob. 44, 48 (Spr. 1977); Becker, *The Currency of Judgment*, 25 Am.Jur.Comp.L. 152, 158 & n.31 (1977) ("Becker"). The New York law of currency conversion must therefore be applied.

With one or two rare exceptions not applicable here, see, e. g., *John S. Metcalf Co.* v. *Mayer*, 213 A.D. 607, 211 N.Y.S. 53 (1st Dep't 1925); *Sirie* v. *Godfrey*, 196 A.D. 529, 188 N.Y.S. 52 (1st Dep't 1921), New York has long favored the breach-day rule, see, e.g., *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 193 N.E. 897 (1934); *Parker* v. *Hoppe*, 257 N.Y. 333, 339-40, 178 N.E. 550 (1931); *Richard* v. *American Union Bank*, 241 N.Y. 163, 149 N.E. 338 (1925); *Hoppe* v. *Russo-Asiatic Bank*, 235 N.Y. 37, 39, 138 N.E. 497 (1923); *Brill* v. *Chase Manhattan Bank*, 14 A.D.2d 852, 220

N.Y.S.2d 903, (1st Dep't 1961); *Librairie Hachette, S.A.* v. *Paris Book Center, Inc.*, 62 Misc.2d 873, 309 N.Y.S.2d 701, 704-05 (Sup.Ct.N.Y.Cty.1970); *De Sayve* v. *de la Valdene*, 124 N.Y.S.2d 143, 154 (Sup.Ct.N.Y.Cty.1953). See also *Meinrath* v. *Singer Co.*, 87 F.R.D. 422, 428-29 (S.D.N.Y. 1980).[7] Until the New York courts choose to change their position on this question, we are bound to apply the breach-day rule, and do so here.

Reversed and remanded for further proceedings consistent with the foregoing.

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[7] Advocates of the judgment-day rule argue that it avoids inconsistent results, depending on whether the suit is brought in the United States or in the courts of the country in whose currency the obligation is denominated:

> Suppose that in X, a foreign nation, the plaintiff delivers a dress to the defendant in return for the latter's promise to pay him 100 units of X currency. The defendant does not pay as promised. Suppose furthermore that ... local law governs the contract and that if suit had been brought in X the plaintiff would have recovered 100 units of X currency which at the time of breach were worth 25 U.S. dollars. Suit, however, is brought some years later in Y, a State of the United States, and by the time that the Y court renders judgment the X currency has depreciated to the point where 100 units of X currency are worth only 10 U.S. dollars. Even at this time, however, the X courts would only give the plaintiff judgment for 100 units of their currency since, with exceptions to rare to mention, courts do not take account of fluctuations in the value of their own local currency. Therefore, the Y court should give judgment for the equivalent in United States dollars at the time of judgment of 100 units of X currency. Only in this way can uniformity of result be assured. The plaintiff, in other words, should be given judgment in Y for $10.
>
> Restatement (Second) of Conflict of Laws § 144, Comment (1971).

On the other hand, New York decisions reflect a conviction that the breach-day rule is the best method of making the plaintiff whole, since

it puts him back in the position which he would have occupied had the defendant performed in a timely fashion, giving the plaintiff the value in U.S. dollars of the foreign currency as of the date when he should have been paid. However, the breach-day rule is favorable to a plaintiff only when the foreign currency in which the obligation was originally measured has depreciated with respect to the defendant's currency (here the dollar) during the period since the breach. If it has appreciated, the judgment rule will be more favorable.

Prior to 1975 it had long been the English rule that all court-awarded judgments were to be made in pounds sterling converted at the time of breach. See, e.g., *In re United Railways of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007. In a series of decisions culminating in *Miliangos* v. *George Frank (Textiles) Ltd.*, [1976] A.C. 443, however, the breach-day rule has been replaced in England by what might roughly be called a payment-day rule, which permits the plaintiff to recover either the nominal value of the obligation in the foreign currency itself or in pounds at the payment-day conversion rate. One commentator has urged that New York could and should adopt a similar rule. Becker, *supra*, at 157-59. An extended debate on the subject has subsequently appeared in English legal periodicals. See, e. g., Knott, *Foreign Currency*, 43 Mod.L.Rev. 18 (1980); Bowles & Whelan, *Judgments in Foreign Currencies: Extension of the Miliangos Rule*, 42 Mod.L.Rev. 452 (1979); Bowles & Phillips, *Judgments in Foreign Currencies: An Economist's View*, 39 Mod.L.Rev. 196 (1976).

APPENDIX B

Opinion of the
United States District Court
For the Southern District of New York

Vishipco Line, Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., Vn Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai, and Nguyen Thi Cham,

Plaintiffs,

v.

The Chase Manhattan Bank, N.A.,

Defendant.

No. 77 Civ. 1251 (RLC)

Boal, Doti & Larsen
Attorneys for Plaintiffs
Suite 8909 One World Trade Center
New York, N.Y. 10048

Arthur M. Boal, Esq.
Arthur M. Boal, Jr., Esq.
Of Counsel

Milbank, Tweed, Hadley & McCloy
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, N.Y. 10005

Andrew J. Connick, Esq.,
Toni C. Lichstein, Esq., and
Paul T. Shoemaker, Esq.
Of Counsel

Carter, District Judge:

Plaintiff, Nguyen Thi Cham, a former national and resident of South Vietnam, seeks to recover the value of a 6 month non-negotiable certificate of deposit issued in her

name on November 27, 1974, by the Saigon branch of defendant Chase Manhattan Bank ("Chase") in the amount of 200 million Vietnamese piastres. Nguyen Thi Cham fled from Vietnam in or about April, 1975, and is presently a resident of the United States.

The ten other plaintiffs—Vishipco Line, Ha Nam Cong Ty, Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Thai Binh C.T., VN Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai, Dai Nam Hang Hai C.T., and Vishipco Sarl—are limited liability corporations operating until on or about April 30, 1975, in the maritime industry in South Vietnam. Each of the above corporations was the holder of a demand piastre account at Chase's Saigon branch, and as of April 24, 1975, the balances in each corporate account were as follows: Vishipco Line, 22,995,328 piastres; Ha Nam Cong Ty, 9,053,016 piastres; Rang Dong Hang Hai C.T., 8,974,556 piastres; Mekong Ship Co. Sarl, 7,239,661 piastres; Thai Binh C.T., 68,218 piastres; VN Tau Bien C.T., 5,925,249 piastres; Van Am Hang Hai C.T., 87,439,199 piastres; Cong Ty U Tau Sao Mai, 380,419 piastres; Dai Nam Hang Hai C.T., 9,397,598 piastres; and Vishipco Sarl, overdrawn in the amount of 12,498,573 piastres. They sue to recover the value of these deposits, and also for damages for the loss of ships which allegedly resulted because of the Saigon bank's refusal or failure to make payments on these accounts on or about April 24, 1975. It is undisputed that none of the corporate plaintiffs have transacted any business in the United States since April 30, 1975.

The matter was tried to the court without a jury on February 6, 11 and 13, 1980.

Although Cham does not now have the certificate of deposit in her possession and it has not been presented to Chase for payment, it is conceded that the certificate was issued on November 27, 1974; that its due date was May 27, 1975, and that it bore interest at the rate of 23½% per

annum, payable at maturity on surrender of the certificate. Tran Dinh Truong, plaintiffs' principal witness, arranged for the purchase of the certificate of deposit issued to Cham and the funds used to effect the transaction came from the demand piastre account in the defendant's Saigon branch of Van Am Hang Hai C.T., one of the corporate plaintiffs.

Chase has maintained and operated a branch bank in Saigon continuously from 1966 until April 24, 1975. In April, 1975, the branch held assets valued at between 6 and 7 million dollars. It operated under and was subject to the laws of South Vietnam. Reserve funds and capital were maintained in South Vietnam, and the deposits and other funds of the branch bank were maintained in Vietnamese piastres.

In April, 1975, the war in South Vietnam was coming to a rapid conclusion. South Vietnamese forces were in retreat. During the week of April 21, 1975, South Vietnamese nationals in Saigon, particularly those who had cooperated with Americans, were withdrawing their funds from the banks and making hurried arrangements to leave the city. Ralph White, a Chase official heretofore stationed in Bangkok, was transferred to Saigon and given the responsibility for closing the Saigon branch, if necessary, and the safe evacuation from Saigon of branch officials, employees and their families. White was advised by the United States embassy on April 23, 1975, that space on a cargo jet would be available the following day to evacuate Chase employees. The bank was closed at noon on April 24, 1975. Keys, safe combinations, ledgers and deposit cards of the branch were turned over to officials of the French embassy. No assets of the branch were removed. On April 30, 1975, Saigon fell.

On May 1, 1975, the Saigon branch was nationalized and its assets seized by the victorious communist regime. The French embassy was required to turn over to govern-

ment officials all records, keys, ledgers, etc., it had received from the Saigon branch, and all banking functions were placed under the control of the Vietnam government.

At trial the principal evidence adduced to support the claims of the corporate plaintiffs was the testimony of Tran Dinh Truong. Truong testified that he was president of each of the plaintiff corporations and owned all or a majority of the stock of each corporation. He stated that on April 24, 1975, he had written 4 checks, each for 20 million piastres drawn on 4 corporate accounts in the Saigon branch and had given the checks to his secretary. The checks were not cashed. His secretary advised Truong that the bank had closed. The corporate accounts on which the checks were drawn were not identified, but the undisputed facts show that only Vishipco Line and Van Am Hang Hai C.T. had balances as of April 24, 1975, sufficient to honor a check for 20 million piastres.

Truong contends that because he was not allowed to withdraw 80 million piastres from the various corporate accounts in the Saigon branch on April 24, 1975, he was unable to pay the crew of some 11 ships then in the Saigon harbor, and thus, the ships were unable to sail from Saigon before it fell to communist forces on April 30, 1975. Two of the ships did sail from Saigon—one, carrying Truong and the other, carrying refugees who had commandeered the vessel. These two ships were the Bong Hong 9 and the Truong Xuan. As I understand it, no claim is being made to recover for the value of these two vessels.

The nine ships involved were the Truong Sinh, Hong Truong, Hoa Xuan, Nghia Truong, Phu Si, Truong Thanh, Patrick, Tan Thanh Phu, and Dong Nam A. Truong's testimony concerning the purchase price of each ship fell far short of being a model of clarity and specificity. On the contrary, it was both confusing and contradictory and for the most part seemed to be *ad hoc*. The figures given as to

the purchase price of each vessel on his direct testimony were at variance with the figures given on cross-examination. For example Truong, when questioned by his counsel, first stated that the purchase price of the Hong Truong was $800,000, but subsequently in response to questions from defense counsel stated that the purchase price was between $300,000 and $400,000. Similarly, the purchase price for the Phu Si was first put at $300,000 but subsequently on cross-examination it was given as $370,000; the Patrick, first, $600,000, later, $400,000; the Dong Nam A, first, $600,000, later, $300,000; the Hoa Xuan, first, $580,000, later, $600,000 to $650,000; the Truong Thanh, first, $500,000, later, $320,000; the Tan Thanh Phu, first, $450,000, later, $480,000; the Truong Xuan, first, $320,000, later, $300,000; the Truong Sinh, first, $300,000, later, $320,000; Nghia Truong, first, $490,000, later, $500,000; and Bong Hong 9, first, $300,000, later, $350,000 (R69-71, 79-81).

Initially Truong fixed the total value of all the ships at 9 million American dollars but subsequently the figure given was reduced to 7 million dollars. He testified that the Truong Xuan was 8 years old as of April, 1975. When on cross-examination he was shown on Bureau Visitas certificate which placed the age of the ship at 17 years in April, 1975, Truong said the vessel had been reconstructed 8 years before 1975. He stated that the Truong Thanh and Tan Thanh Phu were 3 years old. When confronted with a Bureau Visitas certificate showing that the Truong Thanh had been built in 1957 and the Tan Thanh Phu in 1944, Truong testified that the former ship had been rebuilt in 1972 and the latter ship had been converted in 1973. No documentary proof establishing ownership of the vessels in the plaintiff corporations was introduced.

Cham testified that the certificate of deposit in her name in the amount of 200 million piastres with funds furnished by Vishipco Line was repayment of a loan she had made to Truong. Over the years she had loaned Truong monies

totally 170 million piastres, and he had added 30 million piastres in interest. She had begun working for Vishipco Line in 1971 at age 17. Her salary was between 100,000 and 200,000 piastres per month, and with this income, if her testimony is to be believed, she had been able to loan Truong funds over the years that in the aggregate amounted to 170 million piastres. Cham testified that she went to the bank prior to April 24, 1975, seeking to be paid on the certificate but was advised that it was a term deposit that had not matured. Hence she was refused permission to withdraw the funds covered by the certificate.

It is stipulated that on each deposit slip whereby deposits were made in piastre accounts in defendant's Saigon branch contained the following legend: "In accepting this deposit, the Bank assumes no responsibility or liability for any losses to the depositor arising out of delays in or interruptions of the Bank's business due to Acts of God, acts of governmental authority, acts of a public enemy or due to war, riots, fires, floods, civil commotions, insurrections, labor difficulties (including, but not limited to strikes and other work stoppages and slowdowns), severe or adverse weather conditions, or causes beyond the Bank's control." On opening their accounts depositors were advised of the above regulations governing piastre accounts.

Defendant qualified Ta Van Tai, presently a research associate at Harvard Law School doing research on Vietnamese law as a part of the East Asian legal studies program at Harvard, as an expert on Vietnamese law. He had taught at the University of Saigon and practiced law in Saigon from 1968 to 1975. He left Saigon on April 23, 1975. Since leaving Vietnam he has sought to keep abreast of developing law in Vietnam through official government newspapers that publish "laws regulations, decrees, communiques of the government," (R 265), statutes published by government, photocopies of which are at Harvard, and

publications of the United States Government Foreign Broadcast Information Service which monitors newspaper articles of the Vietnam government. (*Ibid*)

He testified that under Vietnamese law governing South Vietnam prior to April 30, 1975, only the manager of a limited liability corporation, such as the plaintiff corporations, possessed the authority to institute court proceedings on behalf of the corporation. The corporate manager was named in the by-laws of the organization, and the named manager continued to hold that office and position until a new manager was appointed. The later could only be accomplished by an extraordinary assembly of the corporation, and succession would become official against third parties only if proof of the action taken by the assembly was filed with the Vietnam commercial court.

He also testified that all commercial banks had been nationalized as of May 1, 1975; that the maritime industry had been taken over by the Vietnam government as of August, 1975; that the property of all Vietnam nationals who had fled the country had been confiscated by the state; that Vietnamese law prior to April 30, 1975, barred the holding of foreign currency by Vietnamese nationals; and piastres could not be exported except that travellers could take 5,000 piastres out of the country; when resident nationals were paid in foreign currency, they were required by law to surrender the foreign currency to the National Bank and accept piastres in exchange; that under Vietnamese law as of April 30, 1975, banks were exonerated from responsibility for any losses incurred in their depositors' accounts which resulted from acts of God, wars, riots, etc.; and that Vietnamese piastres are now no longer valid currency either in Vietnam or anywhere else.

There was testimony by a former Vietnamese national, who had a bank account of 2 million piastres that after the communist takeover he was required to apply to a people's committee to secure permission to obtain any of his bank holdings. He remained in Saigon until May 1978, and

applied three times to the people's committee to secure funds from his bank account. On each occasion was allowed to withdraw 15,000 piastres for a total of 45,000 piastres.

On April 30, 1975, at 12:00 P.M. edt, South Vietnam became a foreign country subject to Foreign Assets Control Regulations, 31 C.F.R. § 500.201, which prohibited any payments on the certificate of deposit or on the corporate accounts. 31 C.F.R. § 500 *et seq.* On October 17, 1977, Cham obtained a license from the Federal Reserve Bank permitting payment to her under the Foreign Assets Control Regulations. 31 C.F.R. § 500.801.

Determination

Before the issues raised here can be fairly adjudicated, a threshold decision must be made as to the substantive law that controls disposition of the controversy. In making that determination the court is bound by the choice of law rules of New York, the forum state. See *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941). Under the conflict of law rules of New York, "controlling effect [is given] to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749 191 N.E. 2d 279 (1963); *see also Auten* v. *Auten*, 308 N.Y. 155, 161, 124 N.E. 2d 99, 102 (1954).

The corporate plaintiffs are, or purport to be, corporations organized and existing under the laws of South Vietnam prior to April 30, 1975, or the representatives of such Vietnamese entities. The individual plaintiff is a Vietnamese national and former resident of South Vietnam. The obligations which plaintiffs seek to vindicate in this forum arose in Saigon and clearly have no relationship to the United States or New York. The funds involved were deposits made in the branch bank of defendant in Saigon.

The loss of the ships for which damages are sought also occurred in South Vietnam. The defendant has its principal place of business in New York. Therefore, New York is not totally without interest in the controversy. Yet, that interest is attenuated at best since the real defendant in this case is not Chase in New York but Chase's former branch bank in Saigon. There seems to be no doubt that Vietnam is the jurisdiction having the greatest concern with the issues raised in this litigation. Thus the law of Vietnam operative in Saigon at the time the plaintiffs allegedly sought to withdraw funds from their deposits in Chase's branch bank and the law of Vietnam now operative in South Vietnam insofar as they may affect plaintiffs' claims control disposition of this controversy.

When foreign law is an issue in a case, that law must be proved as a fact. *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 396-97 (1949); *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473 (1912); *Walton* v. *Arabian American Oil Co.*, 233 F.2d 541 (2d Cir.), *cert denied*, 352 U.S. 872 (1956). Plaintiffs, however, presented no evidence concerning the law of Vietnam. Such failure has resulted in dismissal of a plaintiff's claims. See *e.g.*, *Ozanic* v. *United States*, 165 F.2d 738 (2d Cir. 1948); *McQuade* v. *Compania de Vapores San Antonio, S.A.*, 131 F. Supp. 365 (S.D.N.Y. 1955) (Goddard, J.). However, since defendant has shouldered plaintiffs' burden and offered proof of Vietnamese law, there is no need to dismiss for lack of evidence on which to determine Vietnamese law. We may proceed to the merits.

There has been a failure of proof in respect of the controversy involving the plaintiff corporations and their claims cannot prevail for a variety of reasons. Except for Dai Nam Hong Hai C.T. no one is before the court with authority to represent the corporations or to institute any action on their behalf. Based on Vietnamese law as it existed prior to April 30, 1975, to which we must look to

determine the standing of the corporate plaintiffs, only the managers of plaintiff corporations have the legal capability to confer standing on these entities to institute this litigation. The manager is named in the corporate by-laws. The party so named continues in that position unless he is dismissed or resigns. This act, to dismiss the old manager and name a new one, or to grant a general power of attorney to someone other than the manager, can only be accomplished by a vote of the extraordinary assembly of the corporation. Even in that case the transfer would be defective as to third parties unless the determination of the assembly was recorded in the commercial courts of Vietnam and published in the official gazette or newspapers that carried legal notices (278–80). Truong is named manager in the by-laws of Dai Nam Hong Hai C.T., but no proof was presented that he, or any other party before the court, qualified as manager of any other of the plaintiff corporations pursuant to the requirements of Vietnamese law.

Truong testified that he was president of all the plaintiff corporations but apparently that accords him no standing to sue on behalf of the corporations. Nor did he present any proof that the corporations he purported to represent had taken the necessary steps under Vietnamese law to give him legal authority to act on their behalf. Without such proof Truong's purported authority is subject to challenge by shareholder of the corporation and the manager. (R 278).

Moreover, the communist regime in Vietnam has taken over the maritime transport industry of which the plaintiff corporations were a part, and thus, the Vietnamese government is the successor in interest to plaintiff corporations (R 304). Indeed, the plaintiff corporations no longer have any legal existence since under current Vietnamese law private maritime corporations have been abolished. "It is well settled that at common law and [under] federal jurisdiction a corporation which has been dissolved is as if it

did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect." *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U.S. 257, 259 (1927). Corporate existence and the capacity of a corporation to sue or be sued are governed by the laws of the state of incorporation. *Sevits* v. *McKiernan-Terry Corp.*, 264 F. Supp. 810, 811 (S.D.N.Y. 1966) (Cannella, J.). While under Vietnamese law as it existed prior to the communist takeover, Truong, as manager of Dai Nam Hang Hai C.T., had the legal authority to bring this action on behalf of that corporation, the takeover by communist government and the dissolution of all private maritime corporations has eliminated even the legal basis he previously had to bring this action on Dai Nam Hang Hai C.T.'s behalf. These corporate plaintiffs have engaged in no activity in Vietnam, here or elsewhere since April 30, 1975. They were destroyed by the new Vietnam regime when it dissolved all private maritime corporations in August, 1975 and took control of the whole maritime industry. The plaintiff corporations are no longer viable entities and have no standing to sue in this court.

All of the corporate accounts in the Saigon branch affected by this litigation were piastre demand accounts. Under the existing laws of Vietnam, these accounts could only be paid in piastres. The accounts were subject to regulation which relieved the bank of any liability resulting from acts of God, war, etc., which regulation was in accord with the law of Vietnam prior to April 30, 1975. This regulation was made known to every depositor when a new account was opened and was printed on each deposit slip.

The facts established at trial in reference to the closing of the Saigon branch show that the closing was necessitated by the state of the war in the country and the imminent fall of Saigon to communist forces. Bank officials in Saigon had to close the bank and get the bank employees and their families out of Saigon or else those employees

faced a risk of imprisonment if they remained in the country with avenues of escape cut off by communist forces. Saigon fell on April 30, 1975, only six days after the bank closed.

Also there was no testimony that any demand had been made to withdraw funds from the corporate accounts prior to April 24, 1975. Truong testified that he wrote 4 checks of 20 million piastres each and gave the checks to his secretary who advised him on April 24 that the bank was closed. There was not proof, however, that these checks had been presented to the bank before it closed, and officials had refused to honor them.

All the property of persons who fled Vietnam has been confiscated by the communist regime. Under the act of state doctrine that seizure must be given effect by our courts. See *Underhill* v. *Hernandez,* 168 U.S. 250 (1897). The "courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252. Even though such expropriation is offensive to the public policy of the United States, a federal court is not empowered to examine the propriety of the expropriation or confiscation by a foreign sovereign within its own territorial limits. See *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 401-03 (1964). Even the fact that we disapprove of the foreign regime or that it is not recognized by our government does not empower the courts of this country to refuse to apply the act of state doctrine to acts of a sovereign affecting property within its own territory. See *M. Salimoff & Co.* v. *Standard Oil Co.,* 262 N.Y.220, 227, 186 N.E.679, 682 (1933); *Federal Republic of Germany* v. *Elicofon,* 358 F. Supp. 747, 756 (E.D.N.Y. 1972), *aff'd sub nom. Kunstsammlungen zu Weimar* v. *Elicofon,* 478 F.2d 231 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974). The act of state doctrine, of course, does not prevent application of the law and policy of the United States to confiscation or expropriation of

property located in the United States at the time of expropriation. See *e.g., Republic of Iraq* v. *First National City Bank,* 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966).

Chase in New York cannot be held accountable for the obligations of its Saigon branch under the circumstances of this case. See *Dougherty* v. *National City Bank of New York,* 157 Misc. 849, 285 N.Y.S. 491 (S.Ct. Nassau Co. 1935); *Dougherty* v. *Equitable Life Assurance Co.,* 266 N.Y. 71 (1934); *Tillman* v. *National City Bank of New York,* 118 F. 2d 631 (2d Cir.), *cert. denied,* 314 U.S. 650 (1941), and Hickenlooper Amendment, Foreign Assistance Act of 1964, § 620(e)(2), as amended 22 U.S.C. § 2370(e)(2) does not require a different result since the claims being asserted here come within one of the exceptions articulated in that Amendment, *see United Mexican States* v. *Ashley,* 556 S.W. 2d 784, 786 (Tex. 1977); namely that a state's confiscation of the property of its own nationals does not violate international law. *Dreyfus* v. *Von Finck,* 534 F.2d 24, 31 (2d Cir. 1976).

As for the claim concerning the loss of ships, no convincing or credible evidence has been offered establishing that the loss of these ships was due in any way to any breach of obligation the bank owed to Truong or the plaintiff corporations. Moreover, even if the case against the bank were stronger, Truong's testimony was so totally lacking in credibility that it would be difficult if not impossible to find that this testimony warranted entering judgment in plaintiffs' favor. For all these reasons the corporate plaintiffs cannot prevail in this action.

As to the individual claimant, defendant makes much of the fact that the funds were not Cham's but belonged to a corporate plaintiff. This seems to me to be beside the point. The bank accepted the funds and issued a certificate of deposit in Cham's name. Even though Cham's testimony that the funds deposited constituted repayment to

her by Truong of the principal amount of a loan of 170 million piastres and interest thereon could not be credited, having accepted the deposit as Cham's and issued the certificate to her, the bank cannot now contest the validity of the certificate on the grounds that the piastres were not in fact hers.

The certificate, however, was not payable until maturity and by the time the certificate did mature, both the bank and its assets had been taken over by the communist government. There was no wrongful refusal on the part of the bank in not honoring the certificate before maturity. As indicated, the closing of the bank was a reasonable and necessary act. Once the communist government took over, the state determined what amount, if any, could be withdrawn from individual bank accounts. The communist regime has appropriated the assets of Chase's Saigon branch and confiscated Cham's property. She has no claim against defendant.

Accordingly, the claims of Cham and the plaintiff corporations are dismissed, and judgment is entered for defendant.

SETTLE ORDER.

Dated: New York, New York
November 25, 1980

ROBERT L. CARTER
U.S.D.J.

APPENDIX C

Opinion of the United States District Court for the Southern District of New York on Pretrial Motion

Vishipco Line, Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., Vn Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai, and Nguyen Thi Cham,

Plaintiffs,

—against—

The Chase Manhattan Bank, N.A.,

Defendant.

No. 77 Civ. 1251 (RLC)

Boal, Doti & Larsen, Esqs.
225 Broadway
New York, New York 10007
Attorneys for Plaintiffs
By: Arthur M. Boal

Milbank, Tweed, Hadley & McCloy, Esqs.
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
By: Toni C. Lichstein

Carter, District Judge:

Plaintiffs in this case are Vietnamese corporations[1] that had bank accounts in the Saigon Branch of the Chase Manhattan Bank ("Chase") prior to the fall of South Viet

[1] The non-corporate plaintiff in this action, Nguyen Thi Cham, is not a party to the instant motion.

Nam. They allege that they have made demand for payment on the defendant bank and that Chase has refused to surrender their funds. Plaintiffs (collectively referred to as "Vishipco") seek return of their deposits as well as consequential damages for losses allegedly suffered as a result of their inability to secure their funds on demand. Chase has moved pursuant to Rule 12(b)(6), F. R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief may be granted. For the reasons set forth below, the motion is denied.

Factual Background

The corporations that initiated this lawsuit were incorporated in South Viet Nam and now list a New York address. Plaintiffs had maintained piaster accounts in the Saigon branch of the Chase Manhattan Bank for many years, and from these accounts the corporations paid the expenses of the shipping operations that they conducted.

Chase apparently closed its Saigon branch at some time between April 23, 1975[2] and April 26, 1975.[3] On April 30, 1975 at 12:00 p.m., e.d.t., South Vietnam became a designated foreign country[4] subject to the Foreign Assets Control Regulations, 31 C.F.R. § 500 *et seq.* According to these regulations, accounts of designated foreign nationals are blocked and may not be paid to the depositors.

Plaintiffs allege that they made a demand for payment out of their accounts and that this demand has not been honored.[5] Plaintiffs owned and operated a number of ships

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[2] Amended Complaint, ¶ Sixth.

[3] Affidavit of Peter B. Humphrey, Assistant Treasurer, Chase Manhattan Bank, N.A.

[4] 31 C.F.R. § 500.201.

[5] The current status of the piaster accounts is uncertain. A dollar account in the name of Vishipco Line and not at issue in this litigation has been placed in a special interest-bearing account with payment deferred until the Treasury Department issues an order unblocking the account. Plaintiffs would accept similar disposition of their piaster accounts, implying that these accounts are not now earning interest or are being treated by Chase as the bank's own property.

and they allege that because of Chase's withholding of their funds, they were unable to meet the payroll for the crews of these ships. Plaintiffs claim that as a result of going unpaid the sailors mutineed and took sixteen of the vessels to North Viet Nam.

Chase initially made two primary arguments in favor of dismissing the complaint as to all of the corporate plaintiffs. First, Chase contends that the return of deposits is prohibited by the Foreign Assets Control Regulations and would be null and void. Second, Chase argues that it is not liable for consequential damages for failure to return the Vishipco deposits because payment was forbidden by law. Chase relies on the principle that a party to a contract is released from the consequences of non-performance when performance becomes prohibited by law.[6]

Chase has advanced these arguments throughout the extended course of this litigation.[7] During oral argument on the instant motion, counsel for the defendant for the first time challenged the jurisdiction of this court to entertain any of the claims advanced by the plaintiffs. This argument is based on Chase's interpretation of 31 C.F.R. § 500.504, which is purported to be a limitation on the judicial power of the federal courts. Because this new argument presents a question regarding the very authority

[6] In addition, Chase claims that the account of Vishipco Sarl was overdrawn, warranting dismissal of this plaintiff's cause of action. In support of this contention, Chase has introduced an affidavit of one of its officers. Plaintiffs assert that the statement of this officer is in error and that he lacked personal knowledge of the matters discussed in his affidavit. The parties have thus joined issue on a factual matter which is inappropriate for decision on a motion to dismiss.

[7] The original complaint in this case was filed in March, 1977. The defendant filed a motion to dismiss as to the corporate plaintiffs and the case was referred to Magistrate Sol Schreiber who recommended dismissal without prejudice. When this recommendation was accepted, the plaintiffs filed an amended complaint in May, 1978. It is this complaint that is the target of defendant's current motion to dismiss.

of this court to hear the case before it, it will be addressed first.

Limits on the Judicial Power

The jurisdiction of the district courts specifically includes diversity cases brought by an alien individual or corporation against a citizen of the United States. 28 U.S.C. § 1332(a)(2). *See Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 852 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *El Hoss Engineering & Transport Co.* v. *American Independent Oil Co.*, 289 F. 2d 346, 347 (2d Cir. 1961), *cert. denied*, 368 U.S. 837 (1961); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F. 2d 71, 78 (2d Cir. 1949). Thus, this court has the authority to entertain the instant case unless that authority has specifically been withdrawn by the appropriate legislative action.

The power of Congress to withdraw at least appellate jurisdiction was established in *Ex parte McCardle*, 74 U.S. (7 Wall) 506 (1868). Nevertheless, "there is a serious question whether the *McCardle* case could command a majority view today." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 605 n. 11 (1962) (dissent). Moreover, in the *McCardle* case the legislative intention to remove the jurisdiction of the Supreme Court to review one class of cases was explicit and unambiguous. That is not the case here. Defendant relies on the language of 31 C.F.R. § 500.504 in support of its contention that this court may not hear the instant case.[8] This

[8] The full text of the section reads as follows:

(a) Subject to the limitations of paragraphs (b), (c) and (d) of this section judicial proceedings are authorized with respect to property in which on or since the "effective date" there has existed the interest of a designated national.

(b) A judicial proceeding is authorized by this section only if it is based upon a cause of action which accrued prior to the "effective date."

(c) This section does not authorize or license:

(1) The entry of any judgment or of any decree or order of similar or analogous effect upon any judgment book,

section is part of the Foreign Asset Control Regulations promulgated pursuant to 50 U.S.C. App. § 5. The authorizing statute makes no reference to the withdrawal of any jurisdiction from the federal courts; the only allusion to the judicial branch concerns the absence of liability on the part of any person acting in compliance with the statute. 50 U.S.C. App. § 5(b)(2). Therefore, there is a serious question whether the regulation cited would be a valid exercise of the power delegated by Congress if it were construed in the manner urged by the defendant.

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minute book, journal or otherwise, or the docketing of any judgment in any docket book, or the filing of any judgment roll or the taking of any other similar or analogous action.

(2) Any payment or delivery out of a blocked account based upon a judicial proceeding nor does it authorize the enforcement or carrying out of any judgment or decree or order of similar or analogous effect with regard to any property in which a designated national has an interest.

(d) If a judicial proceeding relates to property in which there exists the interest of any designated national other than a person who would not have been a designated national except for his relationship to an occupied area, such proceeding is authorized only if it is based upon a claim in which no person other than any of the following has had an interest since the "effective date":

(1) A citizen of the United States;

(2) A corporation organized under the laws of the United States or any State, territory or possession thereof, or the District of Columbia;

(3) A natural person who is and has been since the "effective date" a resident of the United States and who has not been a specially designated national;

(4) A legal representative (whether or not appointed by a court of the United States) or successor in interest by inheritance, device, bequest, or operation of law, who falls within any of the categories specified in paragraphs (d)(1), (2) and (3) of this section but only to the same extent that their principals or predecessors would be qualified by such paragraph.

This question, however, need not be reached, because the regulation is better interpreted as leaving unaffected the power of this court to consider the case before it. One case has construed the Foreign Assets Control Regulations in accordance with defendant's interpretation, but this case is no longer consistent with the weight of authority. *Chase Manhattan Bank* v. *United China Syndicate, Ltd.*, 180 F. Supp. 849 (S.D.N.Y. 1960) (Dawson, J.), held that judgment could not be entered in an interpleader action in which the subject matter of the controversy consisted of the securities and cash in a blocked bank account. This ruling was based on the court's reading of 31 C.F.R. § 500.514, the regulation at issue here, and on a letter from the Treasury Department which said:

> "[A] Treasury License is required not only for the payment of funds or the delivery of securities from a blocked account, but also . . . a license is required before any judicial process can affect any property in a blocked account."

Id. at 850. The court dealt with the delegation problem by noting that the "regulations seem to be authorized by the provisions of the Trading with the Enemy Act."[9] *Id.* at 850-51. Based on an independent analysis of the legislative purpose and of the relevant case law, this court has reached an opposite conclusion.

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[9] Judge Dawson's decision in *Chase Manhattan Bank* v. *United China Syndicate, Ltd.*, 180 F. Supp. 849 (S.D.N.Y. 1960), is difficult to reconcile with his ruling six years earlier in *Kuerschner & Rauchwarenfabrik, A.G.* v. *New York Trust Co.*, 126 F. Supp. 684 (S.D.N.Y. 1954). In the prior case, Judge Dawson found that corporate plaintiffs had adequately stated a cause of action despite the fact that the subject matter of the litigation consisted of funds held in a frozen bank account. *Id.* at 688. With regard to the power of the judiciary, Judge Dawson concluded:

> "From the beginning of the 'freezing' controls, no attempt has been made to limit the bringing of suits in the Courts of the United States or of any State to determine title to property which has been frozen."

Id. at 688.

The purpose of the Trading with the Enemy Act and the regulations promulgated thereunder is to prevent hostile nations from benefitting from trade with American citizens.[10] *See Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106, 109-13 (2d Cir. 1966). The regulations serve, in short, as a weapon of economic warfare. In general, they prohibit transfers of assets in which "designated nationals" have an interest. In the case of regulations effective during the world wars, assets of aliens were not only frozen, but in many cases title was also vested in the Alien Property Custodian.

The Supreme Court dealt with these earlier regulations and their effect on judicial processes in *Zittman* v. *McGrath*, 341 U.S. 832 (1951). That case establishes that a federal court may entertain a suit and render judgment as long as no interest in the blocked property is transferred without a license. *See* Goodman, United States Government Foreign Property Controls, 52 Geo. L. J. 767, 797 (1964). In *Zittman, supra*, the Court found that attachment proceedings brought against assets held in a blocked account were not invalidated by the regulations. The Court noted:

> "[E]xecution, if issued, would require a transfer of credit and of funds, but this step has not been taken and, it is admitted, cannot be taken without a federal license. While requirement of a federal license creates something of a contingency as to satisfaction of the judgment, as a matter of New York law this does not deprive the judgment of its validity or the attachment of its lien."

Zittman v. *McGrath*, supra, at 451. The Court acknowledged the possibility that some attachments might in fact be transfers and thus prohibited by the regulations, *id.* at

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[10] Frozen assets also provide a pool from which the claims of American citizens against a hostile nation can be satisfied.

452, but it found that no such transfer was involved in that case. Moreover, the Court quoted from a government brief which took the position that interference with the normal rights of litigants to have their rights established by the courts should be kept to a minimum. *Id.* at 454, 456.

The regulation at issue in the instant case was not specifically considered in the *Zittman* decision, but an analogous regulation had long been in effect:

> "Any transfer effected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

7 Fed. Reg. 2991, 31 C.F.R. 1943 Cum. Supp. 8849 (April 21, 1942). This regulation clarifies the obligation imposed upon the judiciary: no transfer can be effected by a court order if it could not be accomplished by a private individual without a license. The objective of the regulation is to prevent circumvention of the Trading with the Enemy Act by parties who would seek a court order effectuating a transfer that would otherwise be prohibited. The current regulations have the same purpose, and, as in *Zittman,* that purpose is not frustrated by issuance of a judgment that does not transfer title or require immediate payment out of blocked funds.

The more recent Supreme Court case of *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), supports this

conclusion. One issue in that case was whether the petitioner, an instrumentality of the Cuban government, should be denied access to United States courts. In 1963, the Treasury Department had issued the Cuban Assets Control Regulations, 31 C.F.R. § 515.101 *et seq.* These regulations include one section precisely identical to the regulation relied on by Chase in the instant case.[11] 28 Fed. Reg. 6974, 31 C.F.R. § 515.504 (July 9, 1963). Despite these regulations, the Supreme Court held that the petitioner was not barred from access to the federal courts. *Banco Nacional de Cuba* v. *Sabbatino, supra,* at 412. It said:

> "The view that the existing situation between the United States and Cuba should not lead to a denial of status to sue is buttressed by the circumstance that none of the acts of our Government have been aimed at closing the courts of this country to Cuba, and more particularly by the fact that the Government has come to the support of Cuba's 'act of state' claim in this very litigation."

Id. at 411. The Treasury Department, which promulgated the regulations, made the following statement in favor of the petitioner's position in that case:[12]

> "In the event of a judgment in favor of petitioner Banco Nacional, in this case, these Regulations would prohibit the execution of other enforcement of such

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[11] *See* note 5, *supra.*

[12] Brief for the United States as Amicus Curiae, p. 33 n. 31, quoted in Goodman, United States Government Foreign Property Controls, 52 Geo. L. J. 767, 798 (1964). The position of the Treasury Department in this brief is not inconsistent with its communication to the court in *Chase Manhattan Bank* v. *United China Syndicate, Ltd.*, 180 F. Supp. 849, 850 (S.D.N.Y. 1960). In the prior case the Treasury simply warned that a license would be required before judicial processes could "affect" property in a blocked account. *Id.* at 850. Both in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), and in the case at bar, issuance of a judgment by the court would not "affect" blocked assets in the sense of transferring ownership or requiring immediate payment.

> judgment without a license by the Office of Foreign Assets Control of the Treasury Department. It would not be in accordance with present Treasury policy to license any transfer which would have the effect of unblocking the sugar's proceeds should petitioner ultimately prevail here. However in the view of the Treasury the regulations impose no barrier to the continuation of the litigation in this case, nor the entry of a judgment for petitioner."

Thus, if the regulations in the *Sabbatino* case were no barrier to judgment, identical regulations should not interfere with this court's jurisdiction in the instant case.

Two years after *Sabbatino*, the Second Circuit evidenced no misgivings when it took jurisdiction over a similar case. In *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), a Cuban national living in Havana brought suit to compel the release of funds from a blocked savings account in New York. The court rejected the plaintiff's claims that he could receive the funds without a license and that any license requirement would be unconstitutional. However, at no time did the court question the ability of the plaintiff to bring the lawsuit in the first instance.

The interpretation that the defendant advances for the regulation at issue here is not warranted either by the purposes of the Trading with the Enemy Act or by the decided cases. The reasoning of the single case favorable to the defendant is undercut by the *Zittman*, *Sabbatino*, and *Sardino* decisions. The prohibition of 31 C.F.R. § 500.504 against "the entry of any judgment or of any decree" must be construed to forbid only those judicial acts that effect a transfer of interest in property. Since plaintiffs in the case at bar seek only to have their rights established so that their interests will be protected until they can secure a license or until the regulations are lifted, the regulation is no impediment to the assumption of jurisdiction by this

court. The execution of any judgment that this court may issue can be stayed until the temporary barrier to the transfer of the funds is removed.

The Cause of Action

Although it has been determined that the jurisdiction of this court is properly invoked, there is still a question whether plaintiffs have stated a cause of action upon which relief may be granted. It is undoubtedly true that if the attempt to withdraw funds from plaintiffs' accounts occurred after the issuance of the relevant regulations on April 30, 1975, dismissal of the complaint might be appropriate.[13] In that event the intervention of a law forbidding performance by Chase of its contractual obligations would relieve it of its duty to perform. *Texaco Co.* v. *Hogarth Shipping Co.*, 256 U.S. 619, 629-30 (1921) (requisition of ship pursuant to government order excuses owner from performance of prior contract); *L. N. Jackson & Co.* v. *Royal Norweigian Government*, 177 F.2d 694, 697-99 (2d Cir. 1949) (government-mandated change in cargo relieves shipper from liability for loss of profits).

If it had thus been excused from its contractual duties, Chase could not be liable for the consequential damages allegedly flowing from the non-performance of the contract. Similarly, plaintiffs' cause of action for recovery of the accounts would not have accrued, since Chase would not yet have breached its contractual obligation to make payment on demand. *Compare, City of East Cleveland* v. *Fidelity & Deposit Co.*, 5 F. Supp. 212 (N.D. Ohio 1933) (no cause of action against bank closed pursuant to government order) with *Eastern Air Lines, Inc.* v. *McDonnell Douglas*

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[13] In their brief, plaintiffs make an argument in the alternative that the Foreign Assets Control Regulations do not apply to the accounts in question. The court need not reach this issue since in any event the regulations do not affect the court's jurisdiction in this case.

Corp., 532 F.2d 957, 958 (5th Cir. 1976) (treating act of government as "excuse for breach"). *See also*, A. Corbin, Contracts § 1349 (1963) (when bank closed by government order, "the failure of a bank to remain open and pay checks and drafts of depositors should not be held to be a breach of contract. The bank's duty, for the time, is discharged."). Had they not made a prior demand, then, plaintiffs would be unable to state a cause of action until the funds had become unblocked and a proper demand was then refused.

Plaintiffs here, however, have alleged that demand was made upon Chase *before* the effective date of the government regulation, and so they have stated a valid cause of action. A temporary inability to execute judgment does not prevent the case from going forward, as demonstrated by *Birges-Forbes Co.* v. *Heye*, 251 U.S. 317 (1920). There a plaintiff obtained a judgment in the district court prior to World War. I. At the outbreak of the war, the plaintiff was designated an alien enemy, incapable of obtaining a transfer of the funds. The defendant, who had appealed the case and thereby delayed satisfaction of the judgment, sought to dismiss or suspend the action. Mr. Justice Holmes affirmed the decision of the 5th Circuit denying the defendant's motion, and he directed that the judgment be paid to the Alien Property Custodian.

In the present case, of course, plaintiffs have not yet obtained a judgment. But because their cause of action is ripe, they may be permitted to sue, since this court can grant relief analogous to that provided in the *Birge-Forbes* case by directing that the funds be set aside in a blocked, interest-bearing account. *See also, Zittman* v. *McGarth, supra; Sutherland* v. *Mayer*, 271 U.S. 272, 288 (1926) (where only performance that remains under contract is payment, war does not destroy right to collect, but only suspends remedy); *Zimmerman* v. *Hicks*, F.2d 443, 445 (2d Cir. 1925) (war suspends remedies but does not affect relation of parties to contract).

Plaintiffs would be prejudiced by an inability to adjudicate their rights at this time. Plaintiffs' cause of action has accrued, and the statute of limitations has begun to run. Neither party has brought to the court's attention any tolling provision that would be applicable. The difficulties in obtaining testimony at a later date may be substantial, and there is the additional practical question of whether plaintiffs would be entitled to accrued interest if there is further delay in permitting them to litigate. Defendant, on the other hand, will suffer no harm by having its obligations established. *Cf. Pacific Trading Co.* v. *Mouton Rice Milling Co.*, 184 F.2d 141, 148 (8th Cir. 1950) (temporary disability to perform may discharge contractual duties altogether if eventual performance will place greater burden on parties than intended).

The validity of plaintiffs' claim for consequential damages likewise depends upon the temporal relation between the demand for payment and the issuance of the government regulations. Plaintiffs allege that demand was made before the regulations became effective. Thus, if Chase breached its contractual obligations at a time when performance was still legal, it is possible that plaintiffs can show that they are entitled to consequential damages. For the reasons stated above, the fact that satisfaction of any resulting judgment may have to await the lifting of restrictions on transfers to the plaintiffs does not render invalid plaintiffs' cause of action.

Accordingly, defendant's motion is denied.

IT IS SO ORDERED.

Dated: New York, New York
November 2, 1978

ROBERT L. CARTER
U.S.D.J.

APPENDIX D

Opinion of the United States District Court For the Southern District of New York on Pretrial Motion

Viet-Nam Hang-Hai Cong-Thuong Cong-Ty (Vishipco, Vishipping Trading Company) and Tran Dinh Truong, Nguyen Thi Cham and Nguyen Thi Kim Nhu,

Plaintiffs,

—against—

The Chase Manhattan Bank, N.A.,

Defendant.

No. 77 Civ. 1251 (CHT)

For plaintiffs: Boal, Doti & Larsen
225 Broadway
New York, N.Y. 10007

Of counsel: Arthur M. Boal, Esq.

For defendant: Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, N.Y. 10005

Tenney, J.

Three motions are presently pending before the Court in this action. Two were previously preferred to Magistrate Sol Schreiber to hear and report; his recommendations have been made and are accepted in full by the Court. The third motion was made at Magistrate Schreiber's urging to resolve some of the procedural difficulties which

have characterized this case. That motion is unopposed and is granted.

(1) By notice of motion dated May 24, 1977, the defendant Chase Manhattan Bank, N.A. ("Chase") moved to dismiss the complaint for failure to state a claim. That motion was referred to Magistrate Schreiber on January 18, 1978. The Magistrate recommends that the complaint be dismissed as against all plaintiffs except Nguyen Thi Cham without prejudice to the filing of an amended complaint setting forth the proper corporate parties. The recommendation is accepted. The motion for leave to file an amended complaint has been made and is granted below.

(2) By notice of motion dated December 5, 1977, Chase moved to dismiss the claim of Nguyen Thi Cham for failure to state a claim. That motion was also referred to Magistrate Schreiber on January 18, 1978. The Magistrate recommended that the motion be denied without prejudice to its renewal either against the specific claim of Nguyen Thi Cham or the entire amended complaint, if an appropriate certificate of deposit is produced. The recommendation is accepted in full.

(3) By notice of motion dated March 24, 1978, the plaintiffs now move for leave to file an amended complaint naming the proper corporations as plaintiffs. Chase having indicated that it has no opposition, the motion is granted. The plaintiffs shall file their amended complaint forthwith.

So ordered.

Dated: New York, New York
April 19, 1978

CHARLES H. TENNEY
U.S.D.J.

APPENDIX E

Order on Rehearing from the United States Court of Appeals for the Second Circuit

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At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of November, one thousand nine hundred and eighty-one.

Vishipco Line, Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., Vn Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai and Nguyen Thi Cham, *Plaintiffs-Appellants,* v. The Chase Manhattan Bank, N.A. *Defendant-Appellee.*	No. 81-7052

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, The Chase Manhattan Bank, N.A., and briefs *amicus curiae* having been filed by counsel for American Express International Banking Corporation, Bankers Trust Company, Chemical Bank, Citibank, N.A., Irving Trust Company and Morgan Guaranty Trust Company of New York,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO

A. DANIEL FUSARO, *Clerk*

by FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States

* * * * *

ARTICLE II

SECTION. 1. The executive Power shall be vested in a President of the United States of America.

* * * * *

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

* * * * *

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Decree Issued by the Provisional Revolutionary Government of South Vietnam on May 1, 1975

To insure the recovery and management of public offices, organs, barracks and warehouses of U.S. imperialism and the Saigon administration and their common use for the revolution, the Saigon-Gia Dinh City Military Management Committee has decided:

All public offices, public organs, barracks, industrial, agricultural and commercial establishments, banks, communication and transport, cultural, educational and health establishments, warehouses, and so forth—together with documents, files, property and technical means of U.S. imperialism and the Saigon administration—will be confiscated and, from now on, managed by the revolutionary administration.

APPENDIX G

Rule 28.1 Listing of Parents, Subsidiaries and Affiliates

The Chase Manhattan Bank, N.A. is 100% owned by The Chase Manhattan Corporation. The following is a list of the affiliated companies of The Chase Manhattan Corporation as of December 31, 1981:

AOI Lease Co., Ltd.
Acarreo Colon, S.A.
Acero Estructural del Tolima, Ltda.
Addison Road Properties Corp.
African Ponderosa Limited
Agrob Ceramics Inc.
Ahoramas Corporacion de Ahorro y Vivenda
Alaccept Ltd.
Alexandria House Inc.
Alkmaarsche Bank, N.V.
Alliance Acceptance Co., Ltd.
Alliance Acceptance (Wholesale) Pty., Ltd.
Alliance Acceptance (Qld) Ltd.
Alliance Commercial Finance, Ltd.
Alliance Credit (NSW) Pty. Ltd.
Alliance Credit (W.A.) Pty., Ltd.
Alliance Finance (Leasing) Pty., Ltd.
(Formerly Oxford Alliance Pty., Ltd.)
Alliance Holdings Limited
Almacenadora Del Comercio De Depositos Generales, S.A.
Almacenera Del Peru, S.A.
Amanah Chase Merchant Bank Berhad
Amsterdamse Mij Tot Stadsherstel, N.V.
Annbrook, Inc.
Apopka—Vineland Road Corp.
Ardev Corporation
Arnica Pty., Limited
Arrendacima, C.A.
Arrendadora Cremi, S.A.

Arrendamiento Y Credito, S.A.
Atlantic Bank, Ltd.
Augusta Regency, Inc.
Azucarera Central, S.A.
Baker Simpson Inc.
Banco Atlantida, S.A.
Banco Central Hipotecario
Banco De Investimentos Lar Brasileiro, S.A.
Banco Del Comercio
Banco Del Comercio (Panama), S.A.
Banco Hipotecario Dominicano, S.A.
Banco Lar Brasileiro, S.A.
Banco Latinoamericano de Exportaciones, S.A.
Banque De Commerce, S.A.
Banque De Reescompte Et De Placement
Banque Ivoirienne De Developpement Industriel
Bay Point Lagoon Corp.
Belgo Factors, N.V.
Belle Haven East Apartments Corp.
Berkeley Service Corporation
Berkley Road Land Corp.
Beta Predial Limitada
Beverly Bay Corporation
Big Shanty Road Corp.
Bourke Street Nominees Pty., Ltd.
Bouw-en Exploitatiemaatschappij van Onroerende Goederen Bomij, B.V.
B.V. Administratiekantoor van de Nederlandse Credietbank, N.V.
B.V. Algemene Mij 'ALMIJ'
B.V. Exploitatiemaatschappij van Onroerende Goederen 'KAMIJ'
B.V. Factor—Maatschappij Nederland
B.V. Financieringsmaatschappij De Eerste Utrechtse
B.V. Maatschappij Tot Exploitatie van Kantoorlokalen En Andere Onroerende Goederen

CCC Holding, Inc.
Chase Manhattan Leasing Canada, Ltd.
CMRCC, Inc.
CNG International Limited
Calabar Veneer & Plywood, Ltd.
Casa Propia Asociacion De Ahorro Y Prestamo, S.A.
Casa Y Terrenos, S.A.
Cave Creek Road Corp.
Cedar Holdings Inc.
Centrale De Livraison De Valeurs Mobilieres, (Cedel) S.A.
Cerveceria Hondurena, S.A.
Chase Agency Services, Inc.
Chase Bank A.G.
Chase Bank S.A.
Chase Bank (C.I.) Limited
Chase Bank (C.I.) Nominees Ltd.
Chase Bank (C.I.) Trust Co. Limited
Chase Bank Cameroon, S.A.
Chase Bank International
Chase Bank International—Chicago
Chase Bank International—Houston
Chase Bank International—Los Angeles
Chase Bank International—Miami
Chase Bank (Ireland) Ltd.
Chase Commercial Corporation
Chase Commercial Corporation of New York
Chase Company, Inc., The
Chase Econometric Associates, Inc.
Chasefin—Chase Finanziaria, S.P.A.
Chase Home Mortgage Corporation
Chase Home Mortgage Corp of the Southeast
Chase International Investment Corporation
Chase Investors Management Corporation New York
Chase Ireland (Nominees) Limited
Chase Manhattan Asia Limited
Chase Manhattan Bank (Austria) A.G.
Chase Manhattan Bank Luxembourg, S.A.
Chase Manhattan Bank, N.A., The

Chase Manhattan Bank (Switzerland)
Chase Manhattan Bank of Canada
Chase Manhattan Capital Corporation
Chase Manhattan (Hong Kong) Nominees Limited
Chase Manhattan Industrial Bank
Chase Manhattan Financial Services Inc.
Chase Manhattan Leasing Corporation
Chase Manhattan Limited
Chase Manhattan (Singapore) Nominees Private Limited
Chase Manhattan Bank of California
Chase Manhattan Bank of Utah
Chase Manhattan Overseas Banking Corporation
Chase Manhattan Overseas Corporation
Chase Manhattan Overseas Finance Corporation
Chase Manhattan Overseas Finance Corporation N.V.
Chase Manhattan Realty Capital Corporation
Chase Manhattan Realty Leasing Corporation
Chase Manhattan, S.A.
Chase Manhattan Service Corporation
Chase Manhattan Trust Cayman Limited
Chase Manhattan Trust Corporation Limited
Chase Manhattan Trust Corporation (Nominees) Limited
Chase Merchant Bankers Jamaica Limited
Chase Merchant Bank Nigeria Limited
Chase Merchant Services Corporation
Chase National Bank (Egypt), S.A.E., The
Chase National Corporate Services, Inc.
Chase N.B.A. Finance, Ltd.
Chase N.B.A. Group Limited
Chase N.B.A. New Zealand Group Holdings Limited
Chase N.B.A. New Zealand Group Limited
Chase N.B.A. Securities, Limited
Chase-N.B.A. Securities Limited New Zealand
Chase N.B.A. Underwriters Limited
Chase Nominees Ltd.
Chase T/C Service Corp.
Chase U.S. Consumer Services Inc.

Chase Trade Finance, Ltd.
Chase Trade Information Corporation
Chase Trade Services, Inc.
Chestnut Street Hotel Corp.
Chiyoda Lease Co., Ltd.
Chulan Nominess Sdn. Berhad
Clementon Road Land Corp.
Color Mate, Inc.
Colsquare Corporation
Compania Almacenadora, S.A.
Compania Azucarera Choluteca, S.A.
Compania Azucarera Hondurena, S.A.
Compania Azucarera Yogoa S.A.
Compania De Bienes Atlantida, S.A.
Computer Power Inc.
Consolidated Nominees, Ltd.
Convertible Capital Advisory Company, S.A.
Corporacion Financiera De Caldas
Corporacion Financiera Del Tolima
Corporacion Financiera Del Valle
Corporacion Forestal del Tolima
Corporacion Forestal e Industrial De Olancho
Corporacion Grancolombiana De Ahorro Y Vivienda, S.A.
Correctora De Seguros Lar Brasileiro Limitada
Costa Rican Farms, S.A.
Country Meadows, Inc.
Cottontail Plaza, Inc.
Cross River Mills Limited
Dai Shi Lease Co., Ltd.
Desarrollo Industrial, S.A.
Diamond Lease Company Limited
Diamond Lease (Hong Kong) Limited
Diners Club Benelux, S.A.
Distribuidora de Titulos E Valores Mobiliarios
Lar Brasiliaro, S.A.
Durham Development Pty., Ltd.
Duval County Properties, Inc.

Eagle Bay Hotel, Inc.
Edgewater Villa Properties Inc.
Embassy House Properties, Inc.
Empire Holdings, Inc.
Equitable Nominees Ltd.
Essence Communications
Essex-West Hillsborough Avenue Corporation
Export Credit Insurance Corporation of Singapore
F. W. Indiana Property Corp.
Fabrica Nacional De Sacos, S.A.
Filinvest Credit Corp.
Filinvest Finance H.K. Ltd.
Financeira Lar Brasileiro, S.A.
Financiere d'Investissements et de Construction Immobiliere (FICI)
First Federation Holdings, Ltd.
First Federation Discount Co., Ltd.
Flick Developments Pty, Ltd.
Fomento E Inversiones, S.A.
Forestales de Michoacan Desperdicios
Fort Dearborn Mortgage Company
Fountain Crest Inc.
Four Seasons of DeLand, Inc.
Glendale Galleria Inc.
Glenover Corp.
Global Trading International Corporation, S.A.
Green Lake Shopping Center, Inc.
Groningse Maatschappij Tot Stadsherstel, N.V.
H. H. Maryland Corp.
HIC Management Corporation of Florida
HIC Management Corporation of N.C.
HIC Sewer & Water Corporation of N.C.
Hallandale Properties Inc.
Half Moon Towers of Miami, Inc.
Handling Equipment Rentals Pty., Ltd.
Harbour Town Development, Inc.
Hayward—Route 28, Inc.

Helensvale Commercial Centre Pty., Ltd.
Helensvale Estates Proprietary Limited
Hickory Lakes of Brandon, Inc.
Highway Memorial Corp.
Hilton Hotel Maatschappij Amsterdam
HoCo of Myrtle Beach, Inc.
HoCo of Green Lake, Inc.
HoCo of Kansas, Inc.
Hogares Regiomontanos, S.A. De C.V.
Hong Kong Commodities Guarantee Corporation
Hoteles De Honduras, S.A.
Housing Investment Corporation
Hull 1882 Pty., Ltd.
Hull 1883 Pty., Ltd.
Industrial Finance Corp. of Thailand
Inlet Harbor Club, Inc.
Institut De Reescompte Et De Garantie
Interactive Data Corporation
Interactive Data GmbH
Interactive Data Services, Inc.
International Discount Co., Ltd.
International Investment Corporation For Yugoslavia, S.A.
Inversiones Atlantida, S.A.
Inversiones Lomesa, S.A.
Investment Company R.P. Developments, Ltd.
Jacos Co., Ltd.
Jo-Gunn, Inc.
Kam Yuan Choy Mo (Hong Kong) Limited
Kendale Towers Inc.
Kendall Acres West of Miami, Inc.
Kirkgard Drive Corp.
Kitakanto Lease Co., Ltd.
Knollwood Land Co., Inc.
LaCosta Land Company, Inc.
LMS Imoveis Limitada
Laad Caribe, S.A.
Laad de Centroamerica, S.A.

Laad Marketing, Inc.
Lake Solarius Properties Corp.
Lake Worth Road Properties Corp.
Lar Brasileiro Administracao E Servicios, S.A.
Latin American Agribusiness Development Corporation
Laura Pty., Limited
Le Tourneau Center of Tampa, Inc.
Leasing Lar Brasileiro, S.A.
Lee County Properties, Inc.
Liberia Hotels Incorporated
Libra Bank Limited
Libra Bank International Limited
Libra (Finance) Assessoria Financeira Limitada
Libra Financial Services, Inc.
Libra Holdings, Ltd.
Libra International Bank, S.A.—Panama
Libra Nominees, Limited
Libra Trust Limited
Long Bayou, Inc.
Long Reach Leasing Limited
M&M Minerals Corporation
Maatschappij Voor Investeringscrediet 'MAVIC,' N.V.
Maatschappij Voor Trust en Administratiezaken, B.V.
Malaysia Export Credit Insurance Berhad
Mallard Point Inc.
Managed Securities, Ltd.
Managistics, Inc.
Manch, Inc.
Manufacturera Centroamericana, S.A.
Manufacturera Latino-Americana, S.A.
Mayfair Housing of Atlanta Corp.
Medical Offices of Northwest Atlanta, Inc.
Meiko Enterprise Co. Ltd.
Middle-Mooney Property Corp.
Midway Development, Inc.
Mij Tot Verhuur En Financiering Van Bedrijfsmiddelen Lease Plan Nederland, N.V.

Minnesota Holdings
Molino Harinero Sula, S.A.
Moto Lease B.V.
Mt. Gilead Road Corp.
Multivac Trading International Corporation, S.A.
N.S. Leasehold, Inc.
N.V. Effectenbewaarbedrijf van de Nederlandse Credietbank, N.V.
Nagano Lease Co., Ltd.
Nassau Racquet Club, Inc.
National Acceptance Corp., Pty., Ltd.
National Alliance Insurance Co., Ltd.
National Bank for Industrial and Touristic Development
National Investment Bank for Industrial Development, S.A.
Nederlandse Credietbank, N.V.
Nederlandse Credietbank (Deutschland) A.G.
Nederlandse Credietverzekering Maatschppij, N.V.
Nederlandse Participatie Maatschappij, N.V.
Nedlibra Finance, B.V.
Nigerian Textile Mills, Ltd.
Nihon Dental Lease, K.K.
92-32 Street Mgmt. Holding Corp.
Norbax, Inc.
Nordlaw Inc.
North Central Medical Properties, Inc.
North First Gish Corp.
ORE Properties, Inc.
Oceania Capital Corporation Limited
Oceanic Shares Corporation
Octogonal Empreedimentos Ltda.
Ohita Lease Co., Ltd.
Omnibus Leasing (1978) Limited
One Fourteen (114) Lease Co., Ltd.
14277 S.W. 62nd Street Corporation
1031 South First Street Corp.
Orion Apartments, Inc.
Overseas Realty Corp.

Overseas Shares Corporation
PAIC Builders, Inc.
PAIC Finance Corporation
PAIC Insurance Advisors Agency, Inc.
PAIC Securities Corporation
P.P.W., Inc.
P.P.W. Sewer Co., Inc.
P.P.W. Water Co., Inc.
P.W.C Holdings Limited
Pan American Shares Corporation
Papeles Y Cartones, S.A.
Payroll Corporation of America
Perimeter Tower North, Inc.
Peruinvest—Compania De Fomento E Inversiones, S.A.
Philippine American Investments Corporation, The
Pinebrook Kew Gardens, Inc.
Pinon Springs Townhouse Development, Inc.
Polisac, S.A.
Polyproducts de Guatemala, S.A.
Port Dearborn Corporation
Portadown Discounts, Ltd.
Private Export Funding Corporation
Private Investment Company for Asia, S.A.
Publicitaria Tecnica Hondurena
Purcoil (One) Limited
Purcoil (Two) Limited
R.M. Apartments Corp.
R.P. Developments, Ltd.
Real Estate Enterprises Pty., Ltd.
Redeev, Inc.
Representative, Inc.
Rijnbank N.V.
Rittenhouse Capital Corporation
River Road Corp.
Riverchase, Inc.
Robles Del Mar, Inc.
S.H. Investment and Development Corp.
Sample Road—Woodside Drive Corporation

Sandarac Properties, Inc.
Saudi Investment Banking Corporation
Scottish Timber Products, Ltd.
Servi—Administracion, S.A.
Seventy-Seven (77) Lease Co., Ltd.
Societe de Developpment Regional Antilles
Societe Forestiere Et Industrielle De Belabo (Sofibel)
Societe Immobiliere Rue Pierre Fatio 11
Societe Nationale De Credit A L'Industrie, S.A.
Societe Textile de Kisangani (SOTEXKI)
Society for Worldwide Interbank Financial Telecommunication S.W.I.F.T.
Souderton Center, Inc.
South Atlantic Shares Corporation
Southwinds of Miami, Inc.
Spinnaker Cove of Tampa, Inc.
Standish Financial Corporation
Starhar Resorts Corp.
Statewide Facilities Corporation
Steamboat Land Development Company, Inc.
Sunrise Lakes Drive East Corp.
Syarikat Export Credit Insurance Berhad
'T Hooge Huyslevensverzekeringen Van 1891, N.V.
The Hermitage of New Smyrna Beach, Inc.
The Mini Warehouse of Irondale, Inc.
The Oaks of Broward, Inc.
The Villas of Fort Myers Beach, Inc.
The Villas of S.W. 120th Avenue, Inc.
The Villas of South Dade, Inc.
313-315 West 125th Street Corp.
Three Oaks Road Corp.
Tree Creek, Inc.
'Triba', B.V.
Trodyne Corporation
Twin Oaks Plaza of Gibsonton, Inc.
Twin Towers of Tallahassee, Inc.
Uni-Card Company

Uni-Card Corporation
Uni-Card, Inc.
Union Financiere Pour Le Development De L'Economie Cerealiere (Unigrains)
Union Provinciale Immobiliere, S.A.
Uni-Serv Company
Uni-Serv Corporation
Uni-Serv Limited
United Chase Merchant Bankers Limited
United Chase Nominees Private, Ltd.
Venetion Bay View of Naples, Inc.
Venus Mines, Ltd. (N.P.L.)
Vernon 220 Corporation
Video Corporation of America
Virgo Holdings, Inc.
Webb Dock No. 5 Containers Terminal Limited
Western Hemisphere Life Insurance Co.
West Hartsdale Avenue Properties Corp.
Wilmington International Corporation
Windmill Lake Inc.
Wolf—San Juan Leasing Corp.
Woodside Sharon, Inc.
Wun Holdings, Inc.
Yamagata Diamond Lease Co., Ltd.

Opposition

No. 81-1591

Supreme Court, U.S.
FILED
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

OCTOBER TERM, 1981

THE CHASE MANHATTAN BANK, N.A.,

Petitioner,

vs.

VISHIPCO LINES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR M. BOAL
Counsel for Respondents Vishipco Line, et al.
Suite 8909
One World Trade Center
New York, New York 10048
(212) 775-0930

Of Counsel:

ARTHUR M. BOAL, JR.
Boal, Dotl & Larsen
Suite 8909
One World Trade Center
New York, New York 10048

March 26, 1982

Question Presented

Is a corporation relieved of liability on obligations assumed through a branch office, by the voluntary closing of that office, or by the subsequent seizure by insurgent forces of corporate assets at the branch office?

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Authority:

1917 Federal Reserve Bulletin 198 4

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Statement of the Case

The facts of this case are fully and ably stated in the opinion of the Court of Appeals for the 2nd Circuit printed as Appendix A to the petition for a Writ of Certiorari. Nevertheless, this court's attention is called to certain facts

not discussed in the petition. The respondents,* plaintiffs in the District Court, were and are depositors in the Chase Manhattan Bank, N.A., not of any subsidiary or affiliate corporation. This is a suit to collect those deposits. From 1966 until April 24, 1975 The Chase Manhattan Bank operated a branch office in Saigon, South Vietnam. Petitioner's counsel stated in open court:

> "Your Honor, we would be happy to stipulate that it was not separately incorporated and I believe that the expert's testimony which we will offer will show that under the laws of Vietnam it could not be separately incorporated." (A 168)**

The individual respondent, Mrs. Nguyen Thi Cham, had opened a time deposit, and the corporate respondents, known collectively as Vishipco Lines, maintained demand deposits with The Chase Manhattan Bank, N.A., through the Saigon branch. It is however, erroneous to assume that deposits to these accounts were made in piastres or in Saigon. The corporate respondents were engaged in the shipping business and received 70 to 80 per cent of their earnings in United States dollars. These earnings were deposited to their account at offices and branches of the petitioner in various ports of the world.

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* The corporate respondents, Vishipco Line, Ha Nam Cong Ty, Dai Nam Hang Hai C.T., Rang Dong Hang Hai C.T., Mekong Ship Co. Sarl, Vishipco Sarl, Thai Binh C.T., Vn Tau Bien C.T., Van An Hang Hai C.T., Cong Ty U Tau Sao Mai are affiliated Vietnamese corporations; they have no other affiliates, parents or subsidiaries.

** ("A") references are to the Joint Appendix in the Court of Appeals.

The Chase's branch office in Saigon was closed on April 24, 1975 upon directions from New York. It's employees were evacuated the same day. Six days later, on April 30, 1975, Saigon fell to the insurgent forces, however, those forces have never been recognized by the United States government. On May 1, 1975 the insurgents purported to seize the abandoned assets of various banking institutions:

> "All public offices, public organs, barracks, industrial argicultural and commercial establishments, banks, and health establishments, warehouses and so forth together with documents, files, property and technical means of U.S. imperialism and the Saigon administration will be confiscated and, from now on, managed by revolutionary administration." (A-548-9, Exhibit mmm)

The Court of Appeals in its decision specifically found that although assets of the petitioner's branch had been seized there was no evidence of the assumption of any liabilities of that branch or of the agreement to assume the responsibility of the petitioner to its depositors. There was no nationalization of the corporate respondents.

ARGUMENT

The Circuit Court correctly applied this Court's statement of the "Act of State Doctrine" to the facts as found from the evidence.

When Chase, by a decision made in New York, closed the Saigon branch on April 24, 1975 abandoning assets and evacuating personnel, that branch ceased to exist. Chase was no longer present in Vietnam, it could no longer be reached by its creditors in Vietnam. The situs of the

branch's obligations was thereafter in New York, the only place where Chase could be reached and the obligations enforced. See, 1917 Federal Reserve Bulletin 198.

The petitioner cites *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 389 (1964), and argues the misapplication of the "Act of State Doctrine". Petitioner fails to recognize that the decisions of this Court do not require blind recognition to the acts of foreign powers.

In *Standard Cigar Co.* v. *Tabacalera Severiano Jorge, S.A.,* 376 U.S. 780, (1964). This Court granted a petition for a Writ of Certiorari and remanded a smilar case "to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398."

Upon reconsideration the Court of Appeals for the 5th Circuit stated at 392 Fed. 2nd 706, 714-5:

> "Moreover we conclude that in light of the fact that the government of Cuba did not have physical control over the species of property represented by this claim against Standard Cigar Company, it would not violate the Act of State Doctrine for the courts to hold that, had the Cuban government taken all the steps that its unlimited power would have permitted it to take, such conduct by the Cuban government would have permitted it to take, such conduct by the Cuban government would not be recognized by the United States Courts. . . . It should be noted that in the *Sabbatino* case the *res* that was subject to confiscation by the Cuban government was physical property present in Cuba; whereas the res here is a credit owed by an American company in Tampa, Florida. In the case before us, it cannot be doubted that whatever may be the ordinary con-

> cept of the situs of a debt, the government of Cuba was not physically in position to perform a fait accompli in the nature of acquisition by the Cuban government or its intervenor of the money owed to Tabacalera by Standard Cigar Company. It was simply not within the power of Cuba to accomplish this result. To this extent, we think it clear that whatever efforts were made by the Cuban government dealing with Tabacalera, these acts are to be recognized under the Act of State Doctrine only insofar as they were able to come to complete fruition with the domain of the Cuban government. As to the other matters we conclude that they were not a 'taking of property within its own territory' within the language used by the Supreme Court in Sabbatino."

This court denied a second petition for a writ in the case *Tabacalera Severino Jorge* v. *Standard Cigar Co.*, 393 U.S. 924 (1968).

The "Act of State Doctrine" will not force recognition of a confiscation of property not within the territorial limits of the confiscating state.

In the case of *Banco Nacional de Cuba* v. *Chase Manhattan Bank*, 658 Fed. 2nd 875 (2nd Cir., 1981), the Cuban state bank brought suit against Chase on an undisputed claim. Chase counterclaimed for the value of its assets which had been confiscated by the government of Cuba. The court allowed the set off because thet seizure had violated principles of international law by seizing property without compensation.

The act of state doctrine was limited in *Alfred Dunhill of London* v. *Cuba*, 425 U.S. 682, 706 (1976). In the course of that opinion this court stated:

> "In describing the act of state doctrine in the past we have said that it precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory. Banco Nacional de Cuba vs. Sabbatino, supra, at 401 (emphasis added), and that it applies to "acts done within their own States, in the exercise of governmental authority."

In the *Dunhill* case the cigar manufacturer in Cuba was taken over by the interventor. Cigars were shipped by the manufacturer in Cuba before seizure and by the interventor after seizure to customers in the U.S.

After seizure the interventor billed the customers for the value of the shipments made before and after seizure. The customers paid the interventor for the shipment made before seizure. The interventor then sued for payment for the shipment made after seizure. The customers counterclaimed for return of the payments they had mistakenly made to the interventor for shipments made prior to seizure. The court sustained the customers claim for a set off for the amounts paid for shipments made prior to seizure. The "Act of State Doctrine" formed no bar to set set off.

In this case the Court of Appeals found, as a fact, that the situs of the depositors claims after April 24, 1975 was in New York. The Court also stated: (Petitioner's Appendix A, page 18-19a):

> "The May 1st decree nationalizing the Vietnamese banking industry only provided that '(a)ll . . . banks will be confiscated and from now on managed by the revolutionary administration.' In addition, during discovery Chase, in response to the following interrogatory:

Interrogatory 4. When the assets were seized did the government of Vietnam agree to pay the depositors at the Saigon Branch?

replied

Chase lacks the knowledge necessary to answer this interrogatory.

The evidence therefore can only be read as showing that the Vietnamese government confiscated the assets abandoned by Chase in Saigon, but did not thereby affect Chase's liabilities to its depositors."

The court also held that there was no nationalization of the plaintiff corporations.

CONCLUSION

The petition does not present an issue which justifies review by this Court.

This case does not present a conflict of Circuits. The Court of Appeals application of the "Act of State Doctrine" is in accordance with the decisions of this court. The decision as to the situs of the debt is correct in accordance with precedent. Accordingly the petition should be denied.

Dated: March 26, 1982

ARTHUR M. BOAL
Counsel for Respondents Vishipco Line, et al.
Suite 8909
One World Trade Center
New York, New York 10048
(212) 775-0930

Of Counsel:

ARTHUR M. BOAL, JR.
Boal, Doti & Larsen
Suite 8909
One World Trade Center
New York, New York 10048

APPENDIX I

Chase's Answers to Interrogatories

Interrogatory Second (A-16)

"SECOND": As to the decision to close the Saigon Branch please state:

a/ When the decision was made;

b/ By whom was it made;

c/ If made in New York, when was it communicated to the branch in Saigon;

d/ How was it communicated;

e/ If communicated in writing, attach to your answers a copy of that communication; and

f/ What instructions were given to Saigon regarding the assets of that branch.

Answer

The senior management of The Chase Manhattan Bank (N.A.) decided in New York on the evening of April 23, 1975 to recommend suspending the business operations of the Saigon branch for the protection of the officers and employees. This recommendation was transmitted that evening by telephone to Mr. Cornelius Termijn, Manager of the Saigon branch, who was then located in Hong Kong. The branch was instructed that all funds on hand should be placed in the vault and the keys to the vault turned over to responsible French officials for safekeeping.

Interrogatory 5 (A-17)

Please produce copies of all agreements made with the Government of Vietnam including all correspondence with reference thereto.

Appendix I

Answer

There are no agreements with the Government of Vietnam relating to the seizure of Chase's former branch in Saigon.

Interrogatory 16 (A-17)

State what assets the Saigon Branch had outside of Saigon in addition to the bank deposits mentioned in answer to Interrogatory No. 15.

Answer

Those books and records of Chase's Saigon branch which are available to Chase show the following assets outside of Vietnam as of April 23, 1975:

$52,374.00—checks in United States currency sent to The Chase Manhattan Bank, N.C., in New York for deposit.

$26,387.60—accounts receivable, head office and subsidiaries.

Interrogatory 17

"State the amount and number of any payments made to depositors in the Saigon Branch after April 24, 1975."

Answer

Chase had made no payments to piaster depositors in Chase's former branch in Saigon. However, as of September 30, 1978, payments aggregating approximately $980,000 have been made by Chase to dollar depositors whose funds were accepted by Chase's former Saigon branch as agent for redeposit outside of Vietnam.

APPENDIX II

Extract from Chase Exhibit HHHH

(A-566)

"After the complete liberation of South Vietnam, the maritime subsection ( ) of the Saigon-Gin Dinh Military Management Committee quickly took over the management of all maritime transportation facilities abandoned by their owners and set up a state named "the South Vietnam Maritime Transportation Company"

APPENDIX III

Extract from Testimony of Mr. Tai, Expert Witness for Chase

Mr. Tai an expert witness for Chase. (A-244)

Q. Mr. Tai, on the basis of exhibits KKKK and HHHH have you formed an opinion as to the present ownership of assets of maritime corporations which existed prior to April 30, 1975?

A. As stated in the policy statement of 1976, all maritime transport industry was monopolized—has been monopolized by the state. In this sense, all the private maritime transport corporations have been nationalized.

APPENDIX IV

Extract from Testimony of Mr. Lee, Witness for Chase

(A-270-271)

Mr. Lee a witness for the Chase Bank.

Q. Do you know, sir, whether after April 1975 any banks operated in Vietnam other than the government bank?

A. No. Just the government bank the state bank.

APPENDIX V

Extract from Vishipco's Exhibit 3, and Statement of Chase's Counsel

(A-277)

Proceeds of collections from a shipping Agent in Singapore concerning Vishipco Lines shipping chartered fees as of May 23, 1975. This money is now placed in our blocked account General Ledger—reserve account—Vietnam claims. US $130,757.99.

* * *

In reference to this item Mr. Connick stated: (A-45)

> Mr. Connick: That is the point. It didn't come out of Saigon. These funds came from Singapore. They were never subject to nationalization. They were paid by charter parties in Singapore and transferred from Singapore to Chase in New York. They never went through the Saigon branch.

APPENDIX VI

Extract from Testimony of Mr. Truong, Witness for Vishipco

(A-105-106)

The testimony of Mr. Truong

Q. Mr. Truong, you were asked some questions on cross-examination about how much work you did, your company did, for the United States government. You recall that?

A. I do.

Q. In what currency were you paid by the United States goverment?

A. By U.S. dollars.

Q. And how was that transaction handled, how was the payment made, how did it reach your control?

A. The U.S. government pay us in U.S. dollars and for other international operation are paid also in U.S. dollars. Chase convert the U.S. dollar into Vietnamese piastre for us.

Q. Do I understand than that these U.S. dollars were put into your account at the Chase branch?

A. The U.S. dollars are paid in Saigon to the Saigon branch, in Tokyo to the Tokyo branch, in Middle East to the Chase branch in Middle East, and they are transferred to the New York headquarters, then they are sent to Saigon branch.

Q. Do you have an estimate, Mr. Truong, of what proportion of your receipts for these plaintiff companies were in U.S. dollars?

A. The U.S. dollars, the yearly U.S. dollar income is between 70 to 80 percent of our incomes, our total incomes, between 70 to 80 percent.

APPENDIX VII

Statement by Counsel for Chase in Open Court

Ms. Lichstein: Your Honor, we would be happy to stipulate that it was not separately incorporated and I believe that the expert's testimony which we will offer will show that under the laws of Vietnam it could not be separately incorporated.

Amicus Brief

1

No. 81-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

VERITECO LANE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE FEDERAL RESERVE BANK OF NEW YORK FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION AND BRIEF OF THE FEDERAL RESERVE BANK OF NEW YORK AS *AMICUS CURIAE*

J. VIRGIL MATTINGLY, JR.
Counsel for the Federal Reserve Bank of New York
Amicus Curiae
5717 North 13th Road
Arlington, Virginia 22205
(202) 452-3430

ERNEST T. PATRIKIS
Deputy General Counsel
DOUGLAS N. RENDLEMAN
Assistant General Counsel
THOMAS C. BAXTER, JR.
ROBERT M. BOSTROM
JOYCE P. MOTYLEWSKI
Attorneys
Federal Reserve Bank of New York
Of Counsel

March 26, 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1591

THE CHASE MANHATTAN BANK, N.A.,

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VISHIPCO LINE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE FEDERAL RESERVE BANK OF NEW YORK FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The Federal Reserve Bank of New York ("Reserve Bank") moves pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of such brief, but respondents have refused to do so.

The Reserve Bank is one of twelve regional Federal Reserve Banks organized pursuant to the Federal Reserve Act of 1913. Reserve Banks perform service functions for the depository institutions located in their respective geographic regions as well as certain fiscal agency functions on behalf of the United States. The Reserve Bank has an interest in the Petition presently under judicial consideration because the decision of the Court of Appeals could have an adverse impact on the Bank's ability to meet the

liquidity needs of depository institutions within the Second Federal Reserve District.

Under the Federal Reserve Act of 1913 (12 U.S.C. §§347(a), 357), Reserve Banks are authorized to make advances and loans to institutions having transaction accounts or nonpersonal time deposits. Such advances are made to depository institutions that are experiencing financial strains arising from particular circumstances (12 C.F.R. §201.3(b)(2)) or to assist institutions having temporary requirements for funds (12 C.F.R. §201.3(a)). The decision of the Court of Appeals may have a substantial adverse impact on the liquidity of banks located in the United States, because the decision subjects United States banks to potential liability to pay deposits maintained at foreign branches without being able to use the assets of those branches to meet such liabilities. This potential drain on the liquidity of United States banks could result in an increased demand for funds at the Reserve Banks' credit facilities. Such an increase in demand could hinder the ability of the Reserve Bank to implement effectively the nation's monetary policy as formulated by the Federal Open Market Committee. Large, unforseen borrowings at the Reserve Banks' credit facilities would be difficult to offset in an orderly manner through open market operations. Unexpected sharp fluctuations in interest rates could result.

The brief that the Reserve Bank desires to file will contain a new legal argument that has not been addressed by any party in either the Court of Appeals or the District Court. The decision of the Court of Appeals is based upon the concept that the debt of Petitioner's Saigon branch "sprang" from Saigon to New York when the Saigon branch was closed. The Reserve Bank believes that law and logic require the conclusion that a national bank have the authority to suspend operations of a branch in times of crisis. Under then applicable regulations of the Board of Governors of the Federal Reserve System (12 C.F.R. §213.3(d) [Regulation M]), the Saigon branch was not "closed" as a matter of law. Instead, the Reserve Bank submits that the operations of the Saigon branch were

"suspended" as a matter of law. This difference in status is outcome determinative in the instant case because, while it is reasonable to conclude that a debt springs from a branch bank to its U.S. office when the branch closes, such a conclusion is not warranted if the operation of a branch is merely suspended.

Because the Reserve Bank is particularly suited to opine on regulations promulgated by the Board of Governors of the Federal Reserve System and has extensive experience in doing so, the Reserve Bank believes that it is in a unique position to brief the Court on the applicability and impact of Section 213.3(d) of the Code of Federal Regulations, as that section applied in April of 1975 and the rationale underlying such a provision.

Accordingly, the Reserve Bank respectfully requests that its motion for leave to file a brief as *amicus curiae* be granted, and that the brief annexed hereto be submitted to the Court.

Respectfully submitted,

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J. VIRGIL MATTINGLY, JR.
Counsel for the Federal Reserve Bank of New York
Amicus Curiae
5717 North 18th Road
Arlington, Virginia 22205
(202) 452-3430

ERNEST T. PATRIKIS
Deputy General Counsel
DON N. RINGSMUTH
Assistant General Counsel
THOMAS C. BAXTER, JR.
ROBERT E. BOSTROM
JOYCE E. MOTYLEWSKI
Attorneys
Federal Reserve Bank of New York
Of Counsel

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J. VIRGIL MATTINGLY, JR.
Counsel for the Federal Reserve Bank of New York
Amicus Curiae
5717 North 18th Road
Arlington, Virginia 22205
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ERNEST T. PATRIKIS
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Assistant General Counsel
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ROBERT E. BOSTROM
JOYCE E. MOTYLEWSKI
Attorneys
Federal Reserve Bank of New York
Of Counsel

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BRIEF OF THE FEDERAL RESERVE BANK OF NEW YORK AS *AMICUS CURIAE*

The Federal Reserve Bank of New York submits this brief on an issue of significance to the United States banking system: whether a U.S. bank is liable for deposits maintained at its foreign branch, which are by contract payable only at the foreign branch, when the operations of the branch have been suspended because of armed conflict and, subsequently, the business of banking has been confiscated by a new government.

The U.S. Court of Appeals for the Second Circuit, reversing the judgment of the U.S. District Court for the Southern District of New York, held that a national bank was liable for the deposits of its foreign branch even though the banking business in the country where the foreign branch was located was confiscated by a new government. The Court of Appeals found that the foreign branch of the bank was "closed" prior to the expropriation so that the liability for such deposits "sprang" back to the main office of the bank in the United States. This holding overlooks action taken by a national bank pursuant to Federal Reserve regulations, and raises the potential for liability of U.S. banks to pay deposits maintained at foreign branches without being able to use assets of those branches to meet such liabilities.

STATEMENT OF THE CASE

Respondents are an individual and ten Vietnamese corporations that held a certificate of deposit and demand deposits issued by, and payable only at, the Saigon branch of petitioner, The Chase Manhattan Bank, N.A. ("Chase"). All of the deposits were made and payable only in piastres, the currency of South Vietnam. In view of the deteriorating military situation in Vietnam, operations of the Saigon branch were suspended at noon on April 24, 1975, and immediately thereafter, employees of the branch left Vietnam. When the branch suspended operations, branch officers deposited with the French embassy in Saigon the combinations and keys to the locks of the vaults of the branch and a set of the branch records. No assets of the branch were removed from South Vietnam. On May 1, 1975, the new government nationalized the branch and expropriated all of its assets. The respondents brought a civil action in the U.S. District Court for the Southern District of New York against the former owner of the branch, Chase.

The District Court (Carter, J.) dismissed all claims against Chase holding that it had no liability for the deposits because war conditions required the closing of its Saigon

branch and because the new government had taken over and begun operating the banking business in that country.

The Court of Appeals reversed and held Chase liable in the United States for the deposits formerly owed to respondents by the Saigon branch. The holding of the Court of Appeals was based upon a finding that the debts created by the deposits made in the Saigon branch sprang from Saigon to New York when the Saigon branch was closed. Therefore, reasoned the Court of Appeals, the situs of these debts was not Vietnam at the time of the nationalization of the branch, and the obligation to repay the deposits was not affected by the expropriation. In addition, the Court of Appeals held that, by operating in Saigon through a branch rather than through an incorporated subsidiary, Chase "accepted the risk" that it would be liable in New York for the obligations of the branch.

REASONS FOR ALLOWANCE OF WRIT

The Federal Reserve Bank of New York ("Reserve Bank") believes that the decision of the Court of Appeals has significant adverse effects on United States banks by increasing the financial risk of foreign branch operations. The decision requires U.S. banks to pay in this country the debts of their nationalized foreign branches without having the benefit of the assets of those branches. Thus, the decision raises the potential for the imposition of multiple liability on U.S. banks for the deposits of their overseas branches. The Reserve Bank submits that the matter at issue is sufficiently important to warrant the issuance of a writ of certiorari.

SUMMARY OF ARGUMENT

The Reserve Bank believes that the Court of Appeals erred in imposing liability on Chase New York for the deposits held at its former Saigon branch after the branch was nationalized and its assets expropriated by the new government. The operations of the Saigon branch were suspended as provided under applicable Federal Reserve

regulations. As a result, Chase did not wrongfully refuse to repay deposits in Saigon, and deposit liabilities of the Saigon branch did not spring to New York because the Saigon branch was not "closed." Accordingly, the Reserve Bank submits that the Court of Appeals should have given full effect to the nationalization decrees of the new government.

ARGUMENT

I. Federal Reserve Regulations Provided for the Suspension of Operations of a Foreign Branch of a National Bank.

A national bank, such as Chase, may establish a branch outside the United States only with the prior approval of the Board of Governors of the Federal Reserve System ("Board of Governors") and subject to conditions imposed by the Board of Governors. Law and logic require the conclusion that a national bank have the authority to suspend the operations of a foreign branch in times of crisis. At the time Chase suspended the operations of its Saigon branch, the regulations of the Board of Governors governing foreign branch operations — Regulation M (12 C.F.R. Part 213 (1975)), "Foreign Activities of National Banks" — provided for the suspension of operations of a foreign branch. Section 213.3(d) of Regulation M, as in effect in 1975, provided:

> *Suspending operations during disturbed conditions.* The officer in charge of a foreign branch may suspend its operations during disturbed conditions which, in his judgment, make conduct of such operations impracticable; but every effort shall be made before and during such suspension to serve its depositors and customers. Full information concerning any such suspension shall be promptly reported to the branch's home office, which shall immediately send a copy thereof to the Board through the Federal Reserve Bank of its district.

This regulation authorized the suspension of the operations of a foreign branch, and that suspension differed significantly from a closing. The decision of the Court of Appeals implies that a foreign branch cannot suspend its operations and must continue to operate despite armed conflict. Otherwise, foreign branch liabilities would spring back to the United States. The Reserve Bank submits that law and logic as reflected in Regulation M permit suspension of operations and that during any such suspension the depositors of the branch continue as depositors of the branch. Accordingly, the deposit liabilities payable at the Saigon branch did not, as a matter of law, shift to Chase New York but remained in Saigon. Indeed, Chase's actions affirm that the business was to remain in Saigon, and indicate that Chase would continue to operate there if agents could be established or other accommodations made to resume operations. It is illogical to view Chase's actions of turning over of branch records and vault access instructions to a local embassy as transferring those liabilities to the United States.

The act of state doctrine should be applied in this case because the deposits were in Saigon at the time of the expropriation order. Put simply, the act of state doctrine provides that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). The expropriation order issued by the new Vietnamese government on May 1, 1975 provided that:

> All public offices, public organs, barracks, industrial, agricultural and commercial establishments, *banks*, communication and transport, cultural, educational and health establishments, warehouses and so forth — together with documents, files, property and technical means of U.S. imperialism and the Saigon administration — *will be confiscated and, from now on, managed by the revolutionary administration* (emphasis added).

Upon issuance of this order, the new government seized the Saigon branch's assets and its liabilities. The act of state doctrine recognizes that such action taken by a foreign government within its territory is valid. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). The Court of Appeals failed to apply this well-established doctrine because it determined that the Saigon branch's debt sprang back to Chase in New York prior to the date when the seizure order was issued.

This "springing debt" theory as applied by the Court of Appeals has no basis in prior case law, but rather is a theory discussed in a law review article. P. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 L. & Pol'y in Int'l Bus. 903 (1979). The Court cites the Heininger article for the proposition that:

> The situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried, but if the branch is closed, or if a demand for payment there is wrongfully refused, the depositor has a claim against the home office; thus, the situs of the debt represented by the deposit would spring back and cling to the home office. (Footnote omitted.) *Id.* at 975.

However, the concept of a springing debt does not apply to the instant case for two reasons. First, as emphasized above, the Saigon branch was not closed at the time the confiscation order was issued. Under New York law, for example, a bank may shut down all or some of its New York offices in a *force majeure* situation without incurring liability for failure to conduct business. N.Y. GEN. CONSTR. LAW § 24-a (McKinney Supp. 1981). Second, even if the "suspension" is viewed as the functional equivalent of a "closing," the Reserve Bank submits that the springing debt concept should not apply to involuntary closings. The decision of the Court of Appeals leads to the absurd result of compelling the continued operation of

a foreign branch regardless of clear and present dangers to the branch employees.

II. The Entire Banking Business of Chase was Seized by the New Government in Vietnam.

Generally, orders of nationalization are intended to dispose of both assets and liabilities. Moreover,

> if the seizure is accompanied by or accomplished as the result of revolutionary forces overrunning the branch's place of business, forcing its employees to flee, a defense of civil law *force majeure* or temporary impossibility may arise. The branch could avail itself of such defenses at least for some period of time during which the matter might be resolved, for example, by the resumption of business or the promulgation of a decree purporting to affect assets *and* liabilities. P. Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches,* 11 L. & Pol'y in Int'l Bus. 903, 1016 (1979).

The confiscatory decree of the new government had the effect of resuming banking operations in Vietnam and reinstating all assets and liabilities of banks that were operating there. The act of state doctrine compels that the decree be given full effect on its face, and, thus, the liabilities of the branch must be regarded as assumed by the new government. It is illogical to view the surrender of branch records and vault access instructions to a local embassy as transferring branch liabilities from Saigon to New York.

CONCLUSION

For the reasons stated, Chase's petition for a writ of certiorari to the U.S. Second Circuit Court of Appeals should be granted.

Respectfully submitted,

J. Virgil Mattingly, Jr.
Counsel for the Federal Reserve Bank of New York

Amicus Curiae
5717 North 18th Road
Arlington, Virginia 22205
(202) 452-3430

Ernest T. Patrikis
Deputy General Counsel
Don N. Ringsmuth
Assistant General Counsel
Thomas C. Baxter, Jr.
Robert E. Bostrom
Joyce E. Motylewski
Attorneys
Federal Reserve Bank of New York

March 26, 1982

STATUTORY APPENDIX

New York General Construction Law § 24-a

§ 24-a. Closing of banking organizations on Saturday; Sunday, public holiday or Saturday afternoon banking transactions; emergency bank holidays

1. Any banking organization lawfully doing business within the state of New York may be closed on any one or more Saturdays upon the adoption of a resolution to such effect by a majority vote of the board of directors or the board of trustees thereof or of the partners in the case of a private banker. Any one or more of such Saturdays shall, with respect to any such banking organization which shall be closed thereon in accordance with the provisions of this subdivision, constitute a public holiday within the meaning of such term as used in and for all purposes of section twenty-five and twenty-five-a of this chapter (but not, in the case of negotiable instruments, for the purposes of subdivision two of section twenty-five thereof), and shall neither be a "full business day" nor a banking day within the meaning of such terms as used in and for all purposes of the uniform commercial code. The term "banking organization", as used in this section (except where otherwise defined therein), shall mean any banking organization as defined in the banking law, any branch or agency of a foreign banking corporation, any national bank, federal reserve bank, federal savings and loan association, federal home loan bank or federal credit union, and any person or association of persons lawfully carrying on the business of banking in this state whether incorporated or not. As used in this section (except where otherwise defined therein), the term "officers" shall mean the person or persons designated by the board of directors or trustees of a banking organization, or the partners in the case of a private banker, to act for the banking organization in carrying out the provisions of this section; the term "office" shall mean any place at which a banking organization transacts busi-

ness other than its principal office; and the term "person" shall include natural persons, corporations, partnerships and associations.

2. Nothing in any law of this state shall in any manner whatsoever affect the validity of, or render void or voidable, the payment certification or acceptance of a check or other negotiable instrument under the uniform commercial code or any other transaction by a banking organization in this state, because done or performed on any Sunday or public holiday, or on any Saturday between twelve o'clock noon and midnight, provided such payment, certification, acceptance, or other transaction would be valid if done or performed on any business day or before twelve o'clock noon on such Saturday; provided, further, that nothing in this subdivision shall be construed to compel any banking organization in this state, which by law or custom is entitled to close at twelve o'clock noon on any Saturday, to keep open for the transaction of business or to perform any of the acts or transactions aforesaid, on any Saturday after such hour except at its own option or to compel any banking organizations in this state to keep open on a public holiday except at its own option and then only to the extent it elects to do so.

3. a. The governor is authorized, by proclamation, to designate and appoint one or more holidays, or holiday periods, to be known as bank holidays, to be observed throughout the state, or to be observed in a portion or portions thereof, as specified in such proclamation, if an emergency as hereinafter defined, shall, in his opinion, require such action.

b. Whenever the officers of a banking organization are of the opinion that an emergency, as hereinafter defined, exists which affects one or more or all the banking organization's offices, they shall have authority to close one or more or all such offices even though the governor has not issued and does not issue a proclamation of emergency, provided however, that provision is made by such officers

for the transaction of the business normally transacted at a closed office at another office or the principal office of the banking organization, until further notice. The office or offices so closed shall remain closed until the officers or, in the case of a banking organization as defined in the banking law, the superintendent of banks, direct that it be opened. A banking organization closing an office or offices pursuant to this paragraph shall give prompt notice to the superintendent of banks of its action.

c. Whenever the officers of a banking organization are of the opinion that an emergency, as hereinafter defined, exists which affects the banking organization's principal office, they shall have authority to close such principal office even though the governor has not issued and does not issue a proclamation of emergency, provided however, that provision is made by such officers for the transaction of the business normally transacted at such principal office, at another office of the banking organization, until further notice; provided further however, that if no other office of the banking organization can be so designated for the transaction of the business normally transacted at the principal office, the officers may direct that the principal office shall be closed only with the prior approval of the superintendent of banks. The superintendent of banks, in giving such approval, may require certification of such official of the federal government or of the state of New York or a political subdivision thereof as he deems sufficient to establish that an emergency exists which affects such banking organization's principal office. A banking organization closing such principal office pursuant to this paragraph shall give prompt notice to the superintendent of banks of its action.

d. Whenever the officers of a banking organization are of the opinion that an emergency, as hereinafter defined, exists which adversely affects the conduct of any business operation or function conducted at the bank's principal office, they shall have the authority, upon the prior approval of the superintendent of banks, not to conduct such opera-

tion or function even though the governor has not issued and does not issue a proclamation of emergency; provided, however, that such officers may exercise this authority without such prior approval if they have in good faith attempted, but been unable, to contact the superintendent of banks to request permission not to conduct such business operation or function; and provided further the principal office shall not be closed in its entirety pursuant to this paragraph. No business operation or function shall be closed pursuant to this paragraph d unless such officers have attempted, but in good faith found it infeasible to conduct such business operation or function at another office. A banking organization closing any business operation or function pursuant to this paragraph shall promptly notify the superintendent of banks of its action in a manner prescribed by the superintendent.

e. The discretion of the officers of any banking organization in acting pursuant to this subdivision, when exercised in good faith, shall not be questioned in any court or place.

f. No banking organization and no director, officer or employee of a banking organization shall be liable to any person for any direct or indirect loss suffered by such person by reason of the banking organization's failure or inability to make access to the banking organization's premises and facilities available to such person or by reason of the banking organization's failure to perform, or its delay in performing, any contractual, statutory or other duty assumed by or imposed upon the banking organization in any capacity when such failure, inability or delay is caused by the banking organization, or any office or the principal office thereof, being closed as authorized by this section.

g. An emergency, within the meaning of this section, shall mean any condition which may interfere with the conduct of normal banking operations, in the holiday area, or at one or more or all offices or the principal office of a banking organization or organizations, or which poses an imminent or existing threat to the safety and security of

persons or property, or both, including floods, wind, rain, hail or snow storms, power failures, transportation failures, earthquake, fire, riots, strikes, civil commotion, labor disputes, enemy action or threat of enemy action, and any similar or different condition which may interfere physically with the conduct of normal banking operations in the holiday area.

h. During such holiday, holidays and holiday periods, provided for in paragraphs a through c of this subdivision, all banking organizations may close any or all of their places of business in the holiday area. The superintendent of banks may, however, by special or general regulation, restriction, or order, provide that banking organizations (as such term is defined in the banking law) and branches and agencies of foreign banking corporations in this state shall, to the extent and at such of their places of business as may be directed by him, carry on such of their normal and usual operations or banking transactions in the holiday area during such holiday, holidays or holiday period, as may appear to him to be in the best interests of the public. Such holiday, holidays or holiday periods shall, with respect to such place or places of business in the holiday area of any banking organization which shall be closed thereon in accordance with the provisions of this subdivision, constitute a public holiday within the meaning of such term as used in and for all purposes of subdivision one of section twenty-five and of subdivision one of section twenty-five-a of this chapter (but not for the purposes of subdivision two of section twenty-five or of subdivision two of section twenty-five-a thereof), and shall neither be "full business days" nor banking days within the meaning of such terms as used in and for all purposes of the uniform commercial code, to the extent that the performance of obligations under said code are not directed to be performed by the special or general regulations, restrictions or orders of the superintendent of banks, and shall not be deemed to be public holidays for any other purpose, or under any other provision of law. If any banking operation

or function is closed pursuant to paragraph d of this subdivision, a bank holiday shall be deemed to exist, with the same effects and limitations as set forth in the preceding sentence, with respect to such banking operation or function.

i. A bank office or principal office that has been closed as authorized by this section may nonetheless conduct limited operations and perform banking transactions (i) for the convenience of its customers or (ii) relating to transactions between that bank and other banks or persons which have remained open for business or are outside the holiday area.

j. For purposes of this section, each reference to the superintendent of banks shall be deemed to include any official of the banking department to whom authority granted by this section has been delegated. As amended L.1957, c. 947 ; L.1960, c. 553, § 37 ; L.1962, c. 552, § 22 ; L.1964, c. 855, § 3; L.1970, c. 485, § 1; L.1979, c. 209, § 1.

12 C.F.R. § 213.3 (1975)

SECTION 213.3 — FOREIGN BRANCHES

(a) *Establishing foreign branches.* A foreign branch may be established with prior Board permission. If a national bank has established a branch in a foreign country, it may, unless otherwise advised by the Board, establish other branches in that country after thirty days' notice to the Board with respect to each such branch.

(b) *Further powers of foreign branches.* In addition to its other powers, a foreign branch may, subject to §§ 213.3(c) and 213.6 and *so far as usual in connection with the transaction of the business of banking in the places where it shall transact business:*

(1) Guarantee customers' debts or otherwise agree for their benefit to make payments on the occurrence of

readily ascertainable events,[3] if the guarantee or agreement specifies its maximum monetary liability thereunder; but, except to the extent secured with respect thereto, no national bank may have such liabilities outstanding (i) in an aggregate amount exceeding 50 per cent of its capital and surplus or (ii) for any customer in excess of the amount by which 10 per cent of its capital and surplus exceeds the aggregate of such customer's "obligations" to it which are subject to any limitation under section 5200 of the Revised Statutes (12 U.S.C. 84);

(2) Accept drafts or bills of exchange drawn upon it, which shall be treated as "commercial drafts or bills" for the purposes of paragraphs (c), (d), and (e) of § 203.1 of Part 203 (Reg. C);

(3) Acquire and hold securities (including certificates or other evidences of ownership or participation) of the central bank, clearing houses, governmental entities, and development banks of the country in which it is located, unless after such an acquisition the aggregate amount invested by the branch in such securities (exclusive of securities held as required by the law of that country or as authorized under section 5136 of the Revised Statutes (12 U.S.C. 24)) would exceed one per cent of its total deposits on the preceding year-end call report date (or on the date of such acquisition in the case of a newly established branch which has not so reported);

(4) Underwrite, distribute, buy, and sell obligations of the national government of the country in which it is located,[4] but no bank may hold, or be under commitment with respect to, obligations of such a government as a result of underwriting, dealing in, or purchasing for its own

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[3] Including, but not limited to, such types of events as nonpayment of taxes, rentals, customs duties, or costs of transport and loss or nonconformance of shipping documents.

[4] Including obligations issued by any agency or instrumentality, and supported by the full faith and credit, of such government.

account in an aggregate amount exceeding 10 per cent of its capital and surplus;

(5) Take liens or other encumbrances on foreign real estate in connection with its extensions of credit, whether or not of first priority and whether or not such real estate is improved or has been appraised, and without regard to the maturity or amount limitations or amortization requirements of section 24 of the Act (12 U.S.C. 371);

(6) Extend credit to an executive officer of the branch in an amount not to exceed $50,000 or its equivalent in order to finance the acquisition or construction of living quarters to be used as his residence abroad, provided each such credit extension is promptly reported to its home office;

(7) Pay to any officer or employee of the branch a greater rate of interest on deposits than that paid to other depositors on similar deposits with the branch.

(c) *Limitations.* Nothing in § 213.3(b) shall authorize a foreign branch to engage in the general business of producing, distributing, buying, or selling goods, wares, or merchandise or, except as permitted by § 213.3(b)(4), to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities.

(d) *Suspending operations during disturbed conditions.* The officer in charge of a foreign branch may suspend its operations during disturbed conditions which, in his judgment, make conduct of such operations impracticable; but every effort shall be made before and during such suspension to serve its depositors and customers. Full information concerning any such suspension shall be promptly reported to the branch's home office, which shall immediately send a copy thereof to the Board through the Federal Reserve Bank of its district.

Amicus Brief

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-1591

THE CHASE MANHATTAN BANK, N.A.,

Petitioner,

v.

VISHIPCO LINE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The New York Clearing House Association (the "Clearing House") moves pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* in support of the petition for a writ of certiorari. Petitioner has consented to the filing of such brief, but respondents have refused to do so.

The Clearing House is an association of twelve leading commercial banks in the City of New York.* It clears

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* The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Bank of North America, and European American Bank & Trust Company.

commercial drafts and items in the New York City area and files *amicus curiae* briefs before courts of appellate jurisdiction in cases which raise significant questions of law relating to banking.

The decision of the court of appeals imposes upon petitioner, a national bank headquartered in New York, liability at its home office for deposits at a foreign branch which has been seized by the controlling foreign government. To reach that result the court of appeals created an exception to the act of state doctrine unknown to this Court and applied a novel and erroneous view of state law in derogation of federal law and policy.

The Clearing House's member banks are major participants in international and foreign banking and have more than 400 branches in foreign countries. The Clearing House banks thus have a substantial and continuing interest in the development and application of fair, rational and certain rules of law applicable to international and foreign banking. For the reasons set forth in the accompanying brief, the Clearing House believes that the court of appeals' decision is unfair and irrational and creates uncertainty, contrary to the interests of the United States and its banking system.

The Clearing House therefore respectfully prays that the Court grant this motion for leave to file its brief.

Respectfully submitted,

JOHN L. WARDEN
Counsel for The New York Clearing House Association, Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-3610

H. RODGIN COHEN
ELIZABETH M. OLMSTED
SULLIVAN & CROMWELL
Of Counsel

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IN THE

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THE CHASE MANHATTAN BANK, N.A.,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE*

This brief is submitted in support of the petition and on an issue of importance to the United States banking system: Whether an American bank is liable for deposits made and payable at a foreign branch when that branch has been confiscated by the controlling government.

Additional Statutes Involved

The first paragraph of Section 25(b) of the Federal Reserve Act, 48 Stat. 184, as amended, 12 U.S.C. § 632 and N.Y. Banking Law § 138 (McKinney 1971), 1941 N.Y. Laws 150, as amended, are set forth in the Appendix hereto.

Statement

Respondents, Vietnamese nationals, maintained Vietnamese piastre deposit accounts in, and held a piastre certificate of deposit issued by, petitioner Chase's former Saigon branch (A2a).[1] In the face of the imminent fall of Saigon to communist forces, the United States Embassy advised the official in charge of the Chase branch on April 23, 1975, that its employees would be evacuated the following day. At noon on April 24, 1975, the branch's operations were suspended, and its keys, safe combinations, ledgers and deposit cards were placed in the keeping of officials of the French Embassy. No assets were removed (A3b).

On April 30, 1975, Saigon fell, and on May 1, 1975, the Chase branch, along with the entire South Vietnamese banking industry, was confiscated by the communist regime (A3b, A4f). The French Embassy then turned over the branch's books and records to the government (A4a). In 1977, respondents sued Chase at its home office in the Southern District of New York demanding the dollar value of their Saigon deposits as of April 24, 1975 (A2a, A21a, A3c).

The district court, after trial, held that respondents' claims were barred by the act of state doctrine, their deposits with Chase's Saigon branch having been confiscated by the communist Vietnamese government, and rendered judgment for Chase (A12b-14b).

The court of appeals reversed (A2a, A24a). It held that Chase's deposit obligations to respondents "sprang" from Saigon to its home office in New York when the doors of the Saigon branch's office were closed on April 24, 1975,

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[1] "A" citations are to the appendices to the petition for certiorari.

and therefore were not subject to the jurisdiction of Vietnam when the decree of confiscation was published on May 1, 1975 (A15a-18a). The court of appeals also found as a fact that the Vietnamese government had only confiscated Chase's assets in that country and had not assumed its corresponding local deposit liabilities (A18a-19a), and it held that those liabilities therefore were liabilities of Chase in New York (A19a-20a).

Summary of Argument

Many major United States banks maintain a wide network of foreign branches, facilitating the conduct of international commerce and serving to promote United States trade. It is not—and cannot be—one of the purposes of this country's banking system to insure foreign branch depositors against the economic consequences of war, revolution and expropriation in their own countries. Funds never in fact expatriated to the United States, but confiscated by the "host" government where a branch operates, cannot in law or equity be deemed due and payable here.

Yet the court of appeals having jurisdiction over the nation's center of banking and finance has held that when a bank suspends the operations of a foreign branch in the face of advancing enemy armed forces in order to evacuate its employees, the local currency deposits of that branch "spring" to the United States and become payable here in dollars. Subsequent confiscation of the branch and seizure of its assets by the new controlling authorities does not, the court held, discharge these local deposit liabilities because the confiscating government does not assume liabilities by taking assets—the liabilities remain with the American victim of the confiscation. Thus, the American bank must pay twice—once to the foreign government, by force of arms,

and the second time to the foreign branch customers, on demand in New York.

To state such a holding is to expose it as error. Were it to stand, it would pervert the act of state doctrine into a form of legal masochism, whereby foreign governments can confiscate American banking operations within their jurisdictions and their nationals can then come here and demand payment of the "liabilities" of those operations. In addition the court below looked to New York law for its rules of decision, although § 25(b) of the Federal Reserve Act, 12 U.S.C. § 632 (1976), prescribes federal law as controlling, and then devised a rule of New York law contrary to the pronouncements of the New York courts and legislature.

The decision below exposes American banks operating abroad to liabilities far beyond those heretofore contemplated. The public importance of the federal question presented and the irregularity of the court of appeals' decisional process fully warrant the exercise of this Court's discretionary jurisdiction.

ARGUMENT

I.

The Question of an American Bank's Liability for Deposits of a Confiscated Foreign Branch Is Important and Should Be Settled Now by This Court.

American banks maintain approximately 848 branches in at least 67 foreign countries.[2] Liabilities of these over-

[2] Board of Governors of the Federal Reserve System, Bank Structure File (March 4, 1982); U.S. DEPARTMENT OF THE TREASURY, REPORT TO CONGRESS ON FOREIGN GOVERNMENT TREATMENT OF U.S. COMMERCIAL BANKING ORGANIZATIONS (1979), Table 11-1.

seas branches to nonbanks, in local or other foreign currencies and in dollars, exceed the equivalent of $100 billion.[3] Unless expressly guaranteed by the controlling bank's home office, foreign branch deposits are not insured by the FDIC and are not subject to Federal Reserve Board reserve requirements (see pages 9-11, *infra*).

The ultimate question presented by this case—whether American banks are to be held liable on deposits at confiscated foreign branches—is of great importance both to the conduct of the banking industry and to the proper discharge of the statutory responsibilities of the bank regulatory agencies. Should the rule of decision adopted by the court of appeals stand, both the commercial and the regulatory evaluation of the role and utility of foreign branches will have to be sharply revised.

Of the foreign branches maintained by American banks, 424, or 50%, are maintained by banks headquartered in New York City and other cities within the Second Circuit.[4] Litigation with respect to home office liability for foreign branch deposits has been centered historically in the district courts of the Second Circuit and the New York State courts. The Second Circuit having denied rehearing *en banc* (A1e-2e), the decision below will stand, as a practical matter, as the law of the land unless reversed by this Court. In these circumstances, and given the importance of the question presented, certiorari should be granted. *See, e.g., SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 185 (1963); Rule 17.1(c).

Moreover, as discussed below, the court of appeals reached the result it did through a progression of clear

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[3] 68 FED. RESERVE BULL. A57 (Jan. 1982), Table 3.13.

[4] Board of Governors of the Federal Reserve System, Bank Structure File (March 4, 1982).

error. It misconstrued the act of state doctrine, erroneously chose to apply state rather than federal law, and then erroneously interpreted state law in a manner that discriminates against national banks. This marked departure from the rational and dispassionate decisional process which is the hallmark of "the accepted and usual course of judicial proceedings" independently warrants certiorari. *See* Rule 17.1(a).

II.

The Court of Appeals' Application of the Act of State Doctrine Conflicts With Decisions of This Court.

The court of appeals' error in application of the act of state doctrine and its disregard of this Court's controlling decisions is fully discussed in the petition for certiorari, and that discussion need not be repeated here. We add only the following observations.

A. The act of state doctrine arises not only from considerations of international comity but also from the distribution of powers among the three branches of the federal government and the relationship of the judicial branch to the political branches. Development of the doctrine is the peculiar province and responsibility of this Court as the ultimate repository of the federal judicial power. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 424, 425 n.23, 427-37 (1964); *see also Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 689-70 n.5 (1976).

B. The considerations underlying the act of state doctrine cannot lead to the result reached by the court of appeals. Indeed, the doctrine would be truly perverse if so applied—antagonistic foreign governments could confiscate American bank branches and then send their nationals here to our courts and collect a second time on the deposits of

those branches. Thus a legal shield would become a sword, with the courts of this country enlisted as sword bearers to extract payments from American businesses victimized by the confiscatory seizures of totalitarian regimes. We know of no reason to believe that the political branches of our government would be gravely embarrassed unless the judiciary dutifully carried out this task. We likewise cannot discern any prejudice to comity among nations should the judiciary decline to be enlisted as a collection agency for such "debts." *Cf. Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682 (1976); *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972).

C. It is unclear from the court of appeals' opinion whether it was devising its "springing" situs concept as a matter of state or federal law: The court referred twice to its "diversity jurisdiction" (A2a, A21a), and repeatedly referred to New York law as generally applicable to the case (A10a, 17a-21a). In its discussion of the significance of the question of situs, it first referred to its own prior decisions and a decision of this Court (A15a), but then stated, "These principles have been recognized in New York." (A16a). When the "situs" of property is the subject of inquiry for the purpose of determining the applicability of the act of state doctrine, that inquiry must be answered by federal law. The court of appeals' ruling is not, therefore, subject to correction by New York as a matter of state law. *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 424-27.[5]

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[5] This is not to say that state law may not be examined as a source for a rule of decision if it reflects commercial reality and accords with federal policy. *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943); *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447, at 467, 471 (1942) (Jackson, J., concurring). In this case New York law, properly applied, would fully effectuate federal policy. *See* Point IV, *infra.*

D. The analysis that led the court of appeals to the "springing" situs concept is wholly flawed:

1. Chase's supposed "abandonment" of its Saigon branch (A15a) did not terminate the branch's existence and deprive the new Vietnamese regime of the power "to enforce or collect" amounts owing on account of deposits in it (A15a-16a). To the contrary, the branch's existence was not ended; its assets remained in Saigon and its keys, books and records were left in the custody of the French Embassy, which in turn passed them to the new government. Chase merely suspended the branch's office operations in the face of indisputable *force majeure;* the offices could have been reopened and business conducted immediately had the authorities made it possible for Chase employees to return or had they chosen so to conduct its affairs themselves after confiscation. Certainly Vietnam had jurisdiction to cause the branch to pay its depositors, *i.e.*, "to enforce or collect" the obligations of the branch; the evacuation of Chase's employees was of no jurisdictional consequence.

In sum, as a matter of reality the branch's deposit accounts, as well as its assets, remained in Saigon rather than "springing" to New York and were there continuously before and after the banks were confiscated on May 1, 1975. To impose liability for a suspension of operations brought about by evacuation in the face of enemy armed forces is simply absurd. The application of the act of state doctrine cannot depend upon such extraneous factual issues as a bank's degree of concern for the safety of its branch employees, the uncertainty of the battlefield, and the alacrity with which a revolutionary government promulgates its expropriation decree.

2. The proposition that only bank assets and not liabilities were taken by the new regime (A19a) is both legally inadmissible and factually erroneous. We know of no legal

system that professes to separate the taking of a bank's assets from the assumption of its deposit account liabilities, and certainly, for the reasons earlier stated no such notion is acceptable as a component of the act of state doctrine in our courts. (This does not, of course, mean that the confiscating government can not also confiscate ownership of deposit accounts in whole or in part. Indeed, that is what in fact occurred here as to respondents' accounts (A12b, A14b).) Moreover, the district court found as a fact from cited evidence that bank deposit liabilities were assumed by the confiscating authorities, albeit withdrawals were permitted only at the whim of a "people's committee" (A7b-8b, A14b). This finding was not reversed as clearly erroneous, merely ignored.

3. The court of appeals' criticism of Chase, and other American banks, for operating abroad through branches rather than subsidiary corporations (A18a-20a) ignores the reality of international banking, which is largely conducted through branches due to the requirements of foreign governments and for other reasons. It also begs the question: Chase does not seek insulation from the commercial insolvency of a foreign branch but only from being an insurer against foreign expropriations. *Cf. United States* v. *First National City Bank*, 379 U.S. 378, 384 (1965).

4. A foreign branch customer may—if permitted by local law—avoid the political risk of government seizure of a branch's assets by transmitting his deposit through the foreign branch to the United States home office, or by obtaining a home office guaranty of repayment of his deposit (either of which would bring the deposit under United States reserve requirements and FDIC insurance coverage; see page 11, *infra*). Unless such procedures are used, the foreign branch depositor has no reasonable expectation of protection against expropriations. Certainly, respond-

ents, whose accounts were in non-convertible piastres and who took no steps whatsoever to expatriate their funds, should have had no such expectation.

III.

The Court of Appeals Erred in Deciding This Case Under New York Law Instead of Federal Law.

As noted above, the court of appeals deemed this case to be a diversity case controlled by New York law (A2a, A21a). Section 25(b) of the Federal Reserve Act, 12 U.S.C. § 632 (1976), provides, however, that all cases to which a national bank is a party "arising out of transactions involving international or foreign banking . . . or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions . . . in foreign countries, shall be deemed to arise under the laws of the United States." The district courts are granted "original jurisdiction of all such suits," and removal from state courts is allowed "at any time before the trial." *Ibid.*

Chase is a national banking association. This case, therefore, fits precisely within the statute and is entirely controlled by federal law. *See D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447, 455 n.2 (1942); *id.* at 465-75 (Jackson, J., concurring). The obligation to apply federal law where Congress has so prescribed is mandatory under the Supremacy Clause and cannot be made to depend on whether a plaintiff invokes diversity jurisdiction or sues in a state, rather than a federal, court.

Chase's entire authority to operate foreign branches is founded in federal law, 12 U.S.C. § 601 (1976), and federal law treats the foreign branches as entities separate

and distinct from the home office for various purposes. Chase is required by Congress to "conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office." 12 U.S.C. § 604 (1976). Congress has excluded from premium assessment and insurance coverage under the Federal Deposit Insurance Act deposits held in and payable only at those foreign branches. 12 U.S.C. § 1813 (1)(5) (1976). The Federal Reserve Board has excluded foreign branch deposits from the calculation of Chase's reserve requirements. 12 U.S.C. § 461 (1976); 12 C.F.R. § 204.1(c)(5) (1981).[6] In sum, the legal origin of Chase's foreign branch system is federal, and its conduct is extensively regulated by federal law. *Cf. Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366-67 (1943).

It is hardly surprising, therefore, that Congress has prescribed federal law as controlling here. Since the federal regulation of foreign branch banking treats such operations as discrete from the domestic banking system in significant respects, federal public policy requires the rejection of home office liability for deposit accounts of confiscated foreign branches entirely independently of the act of state doctrine.

IV.

The Decision Below Creates a Conflict Between State and Federal Law Where None in Fact Exists and Discriminates Against National Banks.

The court of appeals found the applicable law of New York to be set forth in *Sokoloff* v. *National City Bank,* 239 N.Y. 158 (1924), and an article by "one qualified commen-

[6] The last two factors (FDIC coverage and Federal Reserve reserve requirements) apply as well to state banks whose deposits are federally insured and who are members of the Federal Reserve System, respectively.

tator" (A15a-16a, A17a-19a). The *Sokoloff* case involved "a deposit made in the National City Bank in the city of New York, governed solely by New York law" and has been expressly limited to those facts by the New York Court of Appeals. *Dougherty* v. *Equitable Life Assurance Soc'y*, 266 N.Y. 71, 88 (1934); *see also Sokoloff* v. *National City Bank*, 130 Misc. 66, 73 (Sup. Ct. N.Y. Cty.), *aff'd*, 223 App. Div. 754 (1st Dep't 1927), *aff'd*, 250 N.Y. 69 (1928) ("we are not concerned with questions of liability for transactions originating in Russia and wholly to be performed in Russia, but with a debt incurred in this State"). The "qualified commentator" cites no other authority for his views.

The law of New York utterly rejects the result reached by the court of appeals. The New York Court of Appeals so declared in *Dougherty, supra*, and the Second Circuit itself so recognized in *Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir. 1941), *cert. denied*, 314 U.S. 650 (1941). The *Tillman* opinion recited findings of the referee, Harrison Tweed, in a related state court case to the effect that the acceptance of deposit accounts at a foreign branch does not, without more, create a deposit relationship at a bank's home office in the United States, *id.* at 633, n.1, and held that no "right to resort to the defendant's New York office for payment" survived a foreign branch expropriation, *id.* at 635-36.[7]

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[7] The court of appeals mentioned that Mr. Tweed served as referee in the *Sokoloff* case, identifying him as a former partner of Chase's regular outside counsel, the Milbank, Tweed firm (A17a). The court also noted the fact that two cases it found relevant were not cited by counsel "despite the fact that Chase's counsel here" and in one of the other cases "were the same" (A16a, n.4). The point of these references is unclear: The two cases state the uncontroverted proposition that a foreign government can only expropriate property within its jurisdiction, and Mr. Tweed's decision in *Sokoloff* is not inconsistent with Chase's position here.

Moreover, whatever lingering doubts might have remained after *Dougherty* and *Tillman* were put to rest by the New York Legislature. Section 138 of the New York Banking Law (McKinney 1971) provides that the liability on account of foreign branch deposits of any bank chartered by the State shall be no greater than that of a local bank under local law in the country where the branch is located and shall, in addition, be reduced *pro tanto* by the value of any confiscated branch assets in circumstances such as are present here. In the case of an otherwise solvent branch, seizure of all its assets would void liability on any of its deposits.

While, as the court of appeals noted (A21a), § 138 applies by its terms only to state banks, the rule of decision it prescribes is the law of New York and must be applied as well to national banks.[8] This conclusion is dictated both by basic principles of common law adjudication and by the constitutional requirement that state law not discriminate against national banks. *See First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339, 348-63 (1968) (Marshall, J., dissenting).[9]

The decision below creates just such a discrimination, though none exists in New York law, and further suggests that the solution to any "competitive disadvantage" thereby

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[8] The New York Legislature may well have limited the express coverage of § 138 to state-chartered banks simply because of doubts as to its authority to legislate with respect to national banks.

[9] The majority in *First Agricultural* held national banks immune from state taxation except as specifically authorized by Congress, while Justice Marshall would have allowed "nondiscriminatory state taxation" without specific authorization. *Id.* at 349. As Justice Marshall explains, *id.* at 350-51, discriminatory treatment of national banks is clearly prohibited under any reading of *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

imposed on national banks "lies with Congress, not the judiciary" (A21a). Congress has, however, already adopted a "policy of competitive equality" between national and state banks, *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966), and this Court has repeatedly so recognized in many contexts. *E.g.*, *First National Bank* v. *Dickinson*, 396 U.S. 122, 131-33 (1969); *First National Bank* v. *Walker Bank & Trust Co.*, *supra*; *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 565-66 (1934); *First Agricultural National Bank* v. *State Tax Commission*, *supra*, 392 U.S. at 363 (Marshall J., dissenting) ("a major national banking policy has been to foster competitive equality of national and state banks").

While the interpretation of state law by a federal court of appeals ordinarily presents no occasion for certiorari, here the court of appeals rejected the authoritative pronouncements of both the legislative and judicial branches of the state and devised a "state law" rule of its own. The rule it devised creates a conflict between state and federal law where none in fact exists and unlawfully discriminates against national banks. This extraordinary departure from the normal course of adjudication is an additional reason for plenary review by this Court.

Conclusion

For the reasons stated herein and in the petition, certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOHN L. WARDEN
Counsel for The New York Clearing House Association, Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-3610

H. RODGIN COHEN
ELIZABETH M. OLMSTED
SULLIVAN & CROMWELL
Of Counsel

March 26, 1982

STATUTORY APPENDIX

Title 12, United States Code

§ 632. Jurisdiction of United States courts; disposition by banks of foreign owned property

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.

* * *

New York Banking Law

§ 138. Foreign branches; performance of contracts and repayment of deposits

1. Notwithstanding section 1-105 of the uniform commercial code, any bank or trust company which in accordance with the provisions of this chapter shall have opened

and occupied a branch office or branch offices in any foreign country shall be liable for contracts to be performed at such branch office or offices and for deposits to be repaid at such branch office or offices to no greater extent than a bank, banking corporation or other organization or association for banking purposes organized and existing under the laws of such foreign country would be liable under its laws. The laws of such foreign country for the purpose of this section shall be deemed to include all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power of any kind at the place where any such branch office is located, whether or not such dominant authority be recognized as a de facto or de jure government.

2. Notwithstanding section 1-105 of the uniform commercial code, if by action of any such dominant authority which is not recognized by the United States as the de jure government of the foreign territory concerned, any property situated in or any amount to be received in such foreign territory and carried as an asset of any branch office of such bank or trust company in such foreign territory is seized, destroyed or cancelled, then the liability of such bank or trust company for any deposit theretofore received and thereafter to be repaid by it, and for any contract theretofore made and thereafter to be performed by it, at any branch office in such foreign territory shall be reduced pro tanto by the proportion that the value (as shown by the books or other records of such bank or trust company at the time of such seizure, destruction or cancellation) of such assets bears to the aggregate of all the deposit and contract liabilities of the branch office or offices of such bank or trust company in such foreign territory, as shown at such time by the books or other records of such bank or trust company.

Amicus Brief for the United States

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ALEXANDER L. STEVAS,
CLERK

No. 81-1591

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE CHASE MANHATTAN BANK, N.A., PETITIONER

v.

VISHIPCO LINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
STEPHEN M. SHAPIRO
Deputy Solicitor General
ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. On April 24, 1975, respondents, ten Vietnamese corporations and one Vietnamese individual, held deposit accounts in petitioner's Saigon branch bank (C.A. App. A-24a, A-276).[1] The corporate respond-

[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals.

ents held demand deposit accounts that did not bear interest. The individual respondent held a certificate of deposit that bore interest at the rate of 23½% per year (*id.* at A-24). Under South Vietnamese law and the deposit contracts, the deposits were payable solely in Saigon and solely in piastres, the currency of South Vietnam (*id.* at A-242, A-276). In opening these accounts, each depositor agreed as follows (*id.* at A-24a):

> In accepting this deposit the Bank assumes no responsibility or liability for any losses to the depositor arising out of delays in or interruptions of the Bank's business due to Acts of God, acts of governmental authority, acts of public enemy or due to war, riots, * * * civil commotions, insurrections, * * * or causes beyond the Bank's control.

In addition, the Rules for Accounts of the Saigon branch provided (*id.* at A-572): "The account-holder shall bear the risks resulting from * * * present or future legal provisions promulgated by the state where the account is kept." Those rules were incorporated in all deposit slips used to make piastre deposits.[2]

By April 1975, it became obvious that Saigon would soon fall to the communist forces (C.A. App. A-536 to A-543). Vietcong troops had surrounded Saigon and the frequency of military attacks had increased (*id.* at A-539 to A-542). A cease-fire offer had been refused by the Vietcong (*id.* at A-536), and there was fear of Vietcong reprisals against persons who associated with Americans (*id.* at A-163).

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[2] See Brief In Opposition to the Motion by the Clearing House Association of New York for Leave to File a Brief as Amicus Curiae at 4.

On April 23, petitioner's senior management in New York decided to recommend "suspending the business operations of the Saigon branch for the protection of the officers and employees" (C.A. App. A-16). That same day, the United States Embassy advised petitioner that space on a cargo jet would be available the following day for evacuation of the branch's employees and families (*id.* at A-185). On April 24, the branch "closed [its] doors" (*id.* at A-186).

When the branch closed its doors, branch officers gave the French Embassy in Saigon the combinations and keys to the locks of the branch's vaults, as well as a set of the branch's records (C.A. App. A-158 to A-159, A-552, A-553). These were turned over to the French Embassy because it was believed that the French and the North Vietnamese had good relations; petitioner also believed that this action would "protect the rights or the interests [of] the depositors, because later on, when the branch would * * * be able to * * * reopen, then the books [would be] protected" (*id.* at A-159). None of the branch's assets were removed from Saigon at the time of evacuation (*id.* at A-160).

Saigon was overrun by communist forces on April 30, 1975. On May 1, the new government issued the following decree (C.A. App. A-548):

> All * * * banks * * * will be confiscated and, from now on, managed by the revolutionary administration.

This decree nationalized all private banks in South Vietnam (*id.* at A-548 to A-551). Pursuant to this decree, the French Embassy in Saigon turned over to the new government the keys to petitioner's Saigon branch and the branch's records (*id.* at A-545 to

A-547). Since then, the entire banking function in Vietnam has been assumed by the government (*id.* at A-548 to A-551, A-544). The government apparently has permitted at least some withdrawals by certain depositors of former private banks (*id.* at A-270 to A-271).

2. Respondents, all Vietnamese nationals, sought repayment of their deposits in dollars at petitioner's home office in New York. When that was denied, they brought suit against petitioner in the United States District Court for the Southern District of New York, invoking the diversity jurisdiction of the district court. Respondents alleged that petitioner breached its deposit contracts when it refused to make payment to them in New York after closing its doors in Saigon (Pet. App. 2a).

Following a bench trial, the district court rendered judgment in favor of petitioner (Pet. App. 1b-14b). The court concluded that petitioner was not liable for the obligations of its Saigon branch because the closing of the branch "was necessitated by the state of the war in the country and the imminent fall of Saigon to communist forces" (*id.* at 11b-12b). There was no evidence that any demand had been made to withdraw the corporate deposits before the branch closed, and shortly thereafter "[a]ll the property of persons who fled Vietnam [was] confiscated by the communist regime" (*id.* at 7b, 12b).[3] The court further concluded that "[u]nder the act of state doctrine that seizure must be given effect by our courts" (*id.* at 12b). Accordingly, "Chase in New York cannot be held accountable for the obligations of its Saigon

[3] The district court found that by the time the certificate of deposit matured, "both the bank and its assets had been taken over by the communist government" (Pet. App. 14b).

branch under the circumstances of this case" (*id.* at 13b).

3. The court of appeals reversed (Pet. App. 1a-25a), concluding that petitioner was not relieved of its contractual deposit obligations by the takeover of its Saigon branch by communist forces. Initially, the court ruled that New York law applied to the contract dispute in this case (*id.* at 10a) because "neither party invoked foreign law with respect to Chase's basic obligations to its depositors and holders of certificates of deposit." The court further concluded (*id.* at 11a) that "[u]nder New York law it is clear that, unless relieved of liability under one or more of the affirmative defenses asserted by it, Chase was obligated under its contracts with plaintiffs to pay them the amounts deposited with it."

The court of appeals rejected petitioner's claim (Pet. App. 14a-16a) that the Vietnamese confiscation decree had the effect of seizing the piastre deposits at issue in this case. The court concluded (*id.* at 15a) that the confiscation order did not encompass the deposits, and that, in any event, "upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree" (*ibid.*). Accordingly, since "Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs" (*ibid.*).

The court of appeals also rejected petitioner's claim that there was no breach of contract because conditions prevailing in Saigon at the relevant time rendered payment impossible. The court concluded (Pet. App. 17a) that "[t]his argument must be rejected

for the reason that impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch." The court suggested (*id.* at 18a) that "Chase's defenses of impossibility and *force majeure* might have succeeded if the Saigon branch had been locally incorporated or (more problematically) if the deposit contract had included an explicit waiver on the part of the depositor of any right to proceed against the home office." [4]

Finally, the court of appeals rejected petitioner's claim (Pet. App. 18a-19a) that "the Vietnamese government took steps to assume or cancel its branch liabilities." The court determined that the Vietnamese government had confiscated the assets of petitioner, but had not attempted to alter the contracts between petitioner and its depositors. In these circumstances, the court of appeals concluded that Judge Cardozo's opinion in *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924), was controlling. The court supported its holding by reference to certain considerations of fairness (Pet. App. 20a):

> A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should inform its depositors of the date when its branches will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location. * * * In the

[4] Under South Vietnamese law, foreign banks were limited to branch operations and could not incorporate local subsidiaries (see Pet. App. 18a).

rare event that such measures are either impossible or only partially successful, fairness dictates that the parent bank be liable for those deposits which it was unable to return abroad.

DISCUSSION

Although the court of appeals has decided a question of banking law of substantial concern to several federal agencies responsible for regulating and insuring the banking industry, the United States is unable to conclude that the decision below warrants further review. The sole claim presented in the petition is that the court of appeals erroneously applied the federal "act of state" doctrine, by questioning the validity or challenging the legal effect of a sovereign act of Vietnam in rendering its judgment. The opinion of the court of appeals does not support that argument. Rather, the court merely applied state law, as it was required to do in this diversity case (*Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)), to resolve a somewhat unusual breach of contract dispute. The court's resolution may well be erroneous, but it does not present a substantial federal question.

1. The issue in this case is whether a bank's home office is responsible to depositors of a foreign branch when the branch is forced to suspend operations to protect the safety of its personnel, when the foreign government subsequently confiscates the assets of that branch, and when the deposit contracts in question call for repayment solely in local currency in the foreign country and contain a comprehensive force majeure provision. The court of appeals' resolution of this question has significant practical implications.[5] United

[5] A substantial percentage of the Nation's largest banks with foreign branches have home offices within the Second Circuit.

States banks frequently operate abroad through branch offices, and a number of foreign states require them to operate in branch form. At present, United States banks have approximately 850 branches in more than 65 foreign countries, with liabilities of more than $50 billion payable to foreign depositors in foreign currencies.

The court of appeals' decision implicates the interests of federal regulatory agencies responsible for oversight of the American banking industry, including the Comptroller of the Currency who regulates national banks such as petitioner. Because of the large amount of money deposited by foreign nationals in foreign branches of American banks, the court of appeals' decision substantially complicates the regulatory agencies' task of estimating the risk of liquidity posed by the operation of foreign branches. When examining banks with foreign branches, bank examiners have acted on the general understanding that such banks will not be required to honor deposit contracts payable in local currency when the assets of the foreign branch have been confiscated by local authorities. Nor is it expected that local currency deposits will be payable in dollars. However, the court of appeals' decision makes home offices liable for foreign branch deposits without the benefit of the foreign branch's assets to satisfy those liabilities.

The decision below also has significant implications for the Board of Governors of the Federal Reserve System as a bank regulator and "lender of last resort," and for the Federal Deposit Insurance Corporation.[6] Generally, deposits that are payable only

[6] The Overseas Private Investment Corporation, an agency of the federal government (see 22 U.S.C. 2191), is liable to petitioner as a result of the losses incurred in this case.

overseas are not insurable or assessable by the FDIC (see International Banking Facility Deposit Insurance Act, Pub. L. No. 97-110, Section 102, 95 Stat. 1513). Thus, deposits payable abroad at foreign branches of United States banks ordinarily have not been considered to be insured, and assessments generally have not been collected for such deposits. Because the courts of appeals' decision may impose substantial unanticipated liabilities on a bank's home office, the FDIC's costs may be significantly increased in the event of a bank failure (see 12 U.S.C. 1821 and 1823(e)). Similarly, the Federal Reserve System may be called upon to make loans to banks whose foreign branches are seized, in order to prevent financial embarrassment.[7]

Finally, the court of appeals' decision raises serious concerns about the protection of American citizens and investment overseas. The court below appears to have been influenced by the timing of the evacuation of petitioners' employees from Vietnam as well as petitioner's failure to give "notice" to depositors (Pet. App. 15a, 20a). It is contrary to the policy interests of the United States to penalize American banks for evacuating employees in times of emergency, and petitioner appears to have done all that it could to keep its branch open until the communist takeover. Moreover, the effectiveness of any "notice" to depositors under the conditions disclosed by the record in this case is subject to serious doubt.

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[7] Except where a depositor has received an express guaranty of repayment by the home office, foreign branch deposits have been exempt from the Federal Reserve Board's reserve requirements (12 U.S.C. 461; 12 C.F.R. 204.1) as well as its limitations on interest payments (12 U.S.C. 371a, 371b and 461; 12 C.F.R. Part 217). Thus, in exchange for the safety of a deposit payable at the branch bank's home office, the depositor generally would relinquish the high rate of interest paid to depositors at the bank's foreign branch.

2. *a.* We also have substantial misgivings about the correctness of the decision rendered by the court of appeals. The deposits in question in this case were accepted pursuant to the understanding that "[t]he account-holder shall bear the risks resulting from * * * future legal provisions promulgated by the state where the account is kept" (C.A. App. A-572). In addition, the deposits were accepted subject to a force majeure clause, which disclaimed liability for losses " 'arising out of delays in or interruptions of the Bank's business due to * * * acts of governmental authority, * * * war, * * * insurrections, * * * or causes beyond the Bank's control' " (Pet. App. 6b).[8] The court of appeals' conclusion that these contractual provisions did not relieve petitioner of the obligation to perform elsewhere overlooks the fact that the deposits called for payment in South Vietnam in the currency of South Vietnam (see page 2, *supra*).

Moreover, there is room to doubt whether the "spring[ing] deposit" theory applied by the court of appeals is soundly grounded in New York law and whether, in any event, the court below correctly applied the theory to the facts of this case (see Pet. App. 15a-16a). It appears that the operations of the Saigon branch were merely suspended during the insurgency, as permitted under federal regulatory practice, with the expectation of a resumption of operations at some later time. If that view of the facts were accepted, it would follow that the deposits did not "spring" to New York, but rather remained in Viet-

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[8] The unusually high rate of return on the certificate of deposit (23½%) may reflect the understanding of the parties of the high degree of risk inherent in placing funds on deposit in the Saigon branch. See note 7, *supra*.

nam and were seized by the new Vietnamese government along with the branch's assets.[9]

Finally, it could reasonably be concluded that when Vietnam confiscated the assets abandoned by petitioner in Saigon, and thereafter assumed banking operations, it simultaneously assumed responsibility for making repayment to depositors—particularly Vietnamese citizens such as respondents. See *Tillman* v. *National City Bank*, 118 F.2d 631, 635-636 (2d Cir. 1941). The Vietnamese decree states that the assets of foreign banks were not only to be "confiscated," but also "managed," by the new government (C.A. App. A-548), and at least some Vietnamese depositors apparently have been able to withdraw some of their funds (*id.* at A-270 to A-271). To condition a bank's contractual liability on the intentions of a foreign government, and then to construe the foreign government's seizure and management of a foreign bank branch as a nationalization of the branch's assets but not its liabilities, could encourage foreign governments to seize foreign branches with the expectation that their citizens will seek recompense from the bank's home office.

b. Respondents' reply to the foregoing arguments is that they have entered into a contract with petitioner Chase Manhattan Bank, not with a single

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[9] Under the court of appeals' analysis (Pet. App. 15a), petitioner apparently would have been relieved of its deposit obligations had the branch remained open until it was seized by the communist forces, even though that might have meant death or imprisonment for branch employees. Petitioner was held liable, however, because it closed its doors before the communist takeover. It is anomalous to draw a distinction in the timing of the evacuation of branch employees that would penalize the bank for acting in a responsible manner.

branch office. As stated in their Brief in Opposition to the Motion by the Federal Reserve Bank for Leave to File a Brief as Amicus Curiae at 1-2:

> Until April 24, 1975, the petitioner, The Chase Manhattan Bank, N.A., was present and doing business through an office in Saigon, Vietnam. The office was not a subsidiary, was not separately incorporated. Its name, and no one else's appeared on the deposit slips, bank books and other business documents. The Chase Manhattan Bank, N.A., was the debtor of the depositors. * * * No cogent reason has been presented why the banking industry should be so favored as to be treated as if its branch offices were separately incorporated without doing so; to be able to solicit business as if it were a single entity, but to dishonor its liabilities as if they belonged to another corporation.

Thus, after April 24, 1975, "the only place where the depositors could enforce their rights against the Chase was in New York" (*id.* at 4). Respondents assert, moreover, that not all of the deposits in the accounts in question were made in Vietnamese currency. "The corporate respondents were engaged in the shipping business and received 70 to 80 per cent of their earnings in United States dollars. These earnings were deposited to their account at offices and branches of the petitioner in various ports of the world" (Br. in Opp. 2).

The court of appeals essentially accepted respondents' contract theory, concluding that even though repayment may have become impossible in Saigon, it was not impossible for petitioner to make restitution

to its depositors at its home office.[10] And in reaching that result, the court of appeals found support in a prior decision of the New York Court of Appeals that addressed a similar dispute between a depositor and an American bank whose foreign branch had been expropriated. See *Sokoloff* v. *National City Bank*, 239 N.Y. 158, 167, 170, 145 N.E. 917, 919, 920 (1924). As Judge Cardozo explained in *Sokoloff* (239 N.Y. at 166-168, 145 N.E. at 919-920):

> The defendant is not a bailee for the plaintiff, nor were any of its assets ear-marked to the plaintiff's use. * * * The *res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract. * * * The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. A government of Russia *could* not terminate its existence either by dissolution or by merger, for it was a corporation formed under our laws, and its corporate life continued until the law of its creation declared that it should end. * * * [T]he ending of its Russian business was not the ending of its duty to make restitution for benefits received without requital. As to this, there would be no dispute if its as-

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[10] Under this view, even though the contracts called for repayment in Vietnamese currency in Saigon, restitution in American dollars would be appropriate if Chase closed its branch and prevented repayment in the prescribed medium at the prescribed location. The record does not indicate whether Chase had Vietnamese currency available at its home office or elsewhere, but because the currency was worthless, respondents did not want their deposits returned in that medium in any event. See note 13, *infra*.

> sets had been left intact. The situation in a legal aspect is not changed by the fact that the property of the Russian branch has been scattered or despoiled. Plaintiff did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. * * * The situation is not changed though it be shown that the new or nationalized bank in appropriating the assets assumed the liabilities. * * * [T]here is still no suggestion of a novation, releasing the defendant and substituting its successor. * * * Its obligation as the primary debtor in its relation to its own creditors continued unimpaired.

Judge Cardozo further explained that the "doctrine of frustration" could not excuse nonpayment by the bank, even though its local assets had been confiscated. Impossibility of performance (in rubles) at its Russian branch was not a bar to restitution (in dollars) in New York (239 N.Y. at 169, 145 N.E. at 920).[11] See also *Sokoloff* v. *National City Bank*, 250 N.Y. 69, 82-83, 164 N.E. 745, 749-750 (1928) (concluding that the force majeure doctrine "does not relieve the defendant from the duty of restoring a sum not in excess of the benefits received. * * A different case would be presented if there were a claim for something more, *i.e.*, for damages for loss of profit"). Compare *Dougherty* v. *Equitable Life Assurance Society*, 266 N.Y. 71, 77, 193 N.E. 897, 898 (1934) (reaching a different result with respect to holders

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[11] In *Sokoloff*, in contrast to the present case, the original deposits were made in New York.

of insurance company policies whose rights were determined solely by Russian law).

c. At bottom, the court of appeals has resolved conflicting claims under New York contract law, applying precedents of the highest court of that state. Although we have serious reservations about the correctness of the result reached, and are concerned about its regulatory implications, the decision of the court of appeals in this diversity suit does not appear to fall within that small category of cases properly subject to this Court's discretionary certiorari jurisdiction. See Rule 17.1(a) of the rules of this Court; see also *Burks* v. *Lasker*, 441 U.S. 471, 486 (1979) (the Court does not "'grant certiorari to decide [a question of state law]'"); accord, *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979).

In addition, the court of appeals suggested that the result that it reached could be avoided in future cases by amendment of the deposit contracts in question, or by separate incorporation in foreign nations that permit that course of action (Pet. App. 18a). While both of these proposed solutions may pose practical problems, they highlight the fact that the decision of the court of appeals turns on the particular deposit contracts consummated by petitioner and respondents, not on any issue of federal law warranting this Court's review.

3. Petitioner nonetheless argues (Pet. 6-7) that the decision below warrants review because the court of appeals "decided a federal question" under the "act of state" doctrine, as enunciated by this Court in cases such as *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-428 (1964).[12]

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[12] The federal act of state doctrine, where applicable, requires judicial abstention on questions involving inquiry into

The opinion of the court of appeals does not support this argument. The court of appeals did not have occasion either to question the validity, or challenge the legal effect, of any Vietnamese confiscation order. Rather, the court concluded that the Vietnamese confiscation order had no application to the deposit rights here in question. See Pet. App. 15a ("The plain meaning of [the confiscation decree] is that the seizures involved physical assets only and did not reach whatever claim the corporate plaintiffs might have on their departure for payment of the amounts owed to them by Chase"). Moreover, the court also concluded that respondents' deposit rights were not located in Vietnam at the time of the confiscation decree and, therefore, the decree was irrelevant to their ownership. *Ibid.* ("Since Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree could not have had any effect on its debt to the corporate plaintiffs").

In these circumstances, we do not believe that the federal "act of state" doctrine is implicated in the disposition of this controversy. The court of appeals attributed responsibility to petitioner for its branch's deposit obligations because of petitioner's contractual agreement with its depositors, not because of any action that may have been taken by the authorities in Vietnam.[13]

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the validity or permissible legal effect of an official act of a foreign government within its territory. *Underhill* v. *Hernandez*, 168 U.S. 250 (1897).

[13] In the present interlocutory posture of this case, there has been no determination of the amount of compensation owing to respondents. The court of appeals noted that, on re-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

STEPHEN M. SHAPIRO
Deputy Solicitor General

ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys

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mand, the district court must arrive at a formula for "just compensation for the breach" (Pet. App. 22a). This will require the district court to determine the value of Vietnamese piastres at the time of the breach, as expressed in American dollars (*id.* at 21a-22a & n.6). Petitioner may be able to establish that, at the relevant time—approximately one week before the fall of South Vietnam—the Vietnamese piastre had a low dollar value as reflected in the prevailing exchange rate. In addition, the court of appeals noted that petitioner will have the opportunity to prove that the official exchange rate "was artificially low and should be replaced by a higher rate" (*ibid.*) due to the impending collapse of the South Vietnamese government and its official currency.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 369810 1136

Petitioner's Reply Brief

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WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 530-5000
Counsel for Petitioner
The Chase Manhattan Bank, N.A.

Of Counsel:

ANDREW J. CONNICK
TONI C. LICHSTEIN
PAUL T. SHOEMAKER
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, N.Y. 10005

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This brief is filed by petitioner in answer to the brief of the United States as amicus curiae.*

DISCUSSION

The United States has described accurately and fully the serious problems which the Court of Appeals' determination has created with respect to the financial soundness of American banks having foreign branches, the federal regulation of

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* A list of petitioner's parent, subsidiaries and affiliates was annexed to the Petition for a Writ of Certiorari herein as Appendix G. Amendments to that list are set forth in Appendix A hereto.

banks and their foreign branches and the protection of American citizens and investment overseas (Brief, 7-9). It recognizes a) that the Court of Appeals has unfairly made home offices liable for foreign branch deposits without the benefit of the corresponding assets (Brief, 8) and b) that it is against U.S. policy interests to penalize American banks for evacuating their employees in an emergency, as the Court of Appeals has done herein (Brief, 9). In addition, the United States has forthrightly spelled out its substantial misgivings about the correctness of the court's determination (Brief, 10-11). In these respects, petitioner is in total agreement with the United States' position.

However, it is respectfully submitted that in reaching its conclusion that the petition herein should be denied, the United States has erred on two essential issues. The United States contends a) that this action is a diversity action (Brief 4, 14) which merely involves questions of New York contract law, and b) that this action does not involve the federal "act of state" doctrine. For the reasons set forth below, those contentions are erroneous and thus cannot properly support a conclusion that the petition should be denied.

Federal Question Jurisdiction Exists Under 12 U.S.C. § 632

Contrary to the suggestion of the United States, respondents did not even purport to found jurisdiction for this action on diversity grounds. Moreover, if they had sought to base jurisdiction on diversity, they would have failed.

Section 1332(a)(2) of Title 28, U.S.C., provides for jurisdiction of actions between "citizens of a State and citizens or subjects of a foreign state". The term "foreign state" in Section 1332(a)(2) refers to a foreign state recognized by our government. *See Murarka* v. *Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954); *Windert Watch Co.* v. *Remex Electronics Ltd.*, 468 F.Supp. 1242, 1244 (S.D.N.Y. 1979). As stated in *Windert*, a foreign state means a "political entity that is recognized by the United States as a free and

independent sovereign". 468 F.Supp. at 1244. Since 1975 there has been no South Vietnam, and there is today no political entity named South Vietnam which is recognized by the United States as a free and independent sovereign. As stateless persons, respondents were not in a position to invoke diversity jurisdiction. *See Shoemaker* v. *Malaxa*, 241 F.2d 129 (2d Cir. 1957).

One district court has made an exception to this rule and deemed refugees to be citizens of the State of the U.S. in which they were residing for purposes of the diversity statute. *Blanco* v. *Pan American Life Insurance Co.*, 221 F.Supp. 219, 227-28 (S.D. Fla. 1963), *aff'd in part, rev'd in part on other grounds*, 362 F.2d 167 (5th Cir. 1966). Such an approach would not support diversity jurisdiction here, however, since New York is alleged to be the residence of the individual respondent and the principal place of business of the respondent corporations, and New York is the principal place of business of petitioner.

As a result, jurisdiction herein can only be based on 12 U.S.C. § 632 and 28 U.S.C. § 1331. Actions brought under Section 632 are "deemed to arise under the laws of the United States," 12 U.S.C. § 632, and raise federal questions. *Cordova & Simonpietri Insurance Agency, Inc.* v. *The Chase Manhattan Bank, N.A.*, 649 F.2d 36, 37 n.32 (1st Cir. 1981) ("Section 632, enacted in 1933, grants federal question jurisdiction to district courts in all civil suits involving 'international or foreign banking' . . . where a federally chartered corporation is a party to the suit"); *Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *First Federal Savings and Loan Association of Puerto Rico* v. *Ruiz de Jesus*, 644 F.2d 910 (1st Cir. 1981).

Section 632 provides:

> Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United

> States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

This statute reflects a public policy that issues relating to the conduct of international and foreign banking by national banks, organized under the laws of the United States, are federal in nature and should be encompassed within the scope of federal subject matter jurisdiction. It also reflects a sound policy that such issues be decided under a uniform body of law—the laws of the United States—and that inconsistent determinations arising from application of differing state laws would be detrimental to foreign banking relationships.

Moreover, the provision of 12 U.S.C. § 632 that this action "be deemed to arise under the laws of the United States" is consistent with the pervasive scheme of federal statutes and regulations governing the operations of foreign branches of national banks which are noted by the United States (Brief, 7-9). Applications of state law would be repugnant to the comprehensive scheme of federal regulations specifically relating to the obligations of the head office of a national bank with respect to foreign branch deposits and would allow conflicting decisions on a substantial question of national concern.

The United States is in error in characterizing this action as one based on diversity jurisdiction and thereby one involving only matters of state contract law. It is an action jurisdictionally founded on 12 U.S.C. § 632 and 28 U.S.C. § 1331, and in any event, regardless of whether or not diversity might exist in an action such as the present, under Section 632 questions such as those at issue are federal in nature.

The Court Ignored the Act of State Doctrine

In reaching its conclusion that the act of state doctrine is not involved herein, the United States asserts, "The Court of Appeals did not have occasion either to question the validity, or challenge the legal effect, of any Vietnamese confiscation order". That statement misses the point. What the court did was to ignore totally the act of state doctrine by its tortured creation of the unprecedented "springing" situs of debt theory. In failing to apply the federal act of state doctrine the court deprived petitioner of protection recognized by this Court under federal law in such situations since the early days of the Republic. It is that erroneous refusal to apply the act of state doctrine which petitioner urges as a substantial and important federal question.

The material facts are undisputed. Petitioner's branch, its building, its books and records, its assets and liabilities, were taken over by the revolutionary government. No assets of the branch were removed from Saigon. No liabilities of the branch were transferred from Saigon. The entire banking entity remained in Saigon at all times, albeit operations were suspended at the time of the forced departure of petitioner's personnel. The revolutionary government nationalized the branch in its entirety, along with other former private banks, and assumed all deposit obligations, and it now administers those banking properties as part of a national banking system. Such is a classic case for the application of the act of state

doctrine by recognizing as done that which a foreign sovereign has said is done, to wit, the confiscation of assets and assumption of deposit liabilities of former private banks.*

The lower court's failure to apply the act of state doctrine raises a substantial and important federal question meriting review by this Court.

Conclusion

The petition should be granted.

Dated: October 16, 1982.

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 530-5000
Counsel for Petitioner
The Chase Manhattan Bank, N.A.

Of Counsel:

ANDREW J. CONNICK
TONI C. LICHSTEIN
PAUL T. SHOEMAKER
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, N.Y. 10005

*In a case full of anomalies, one of the most glaring is that the revolutionary government assumed the deposit liabilities of the branch and is administering those deposits on the basis of the branch assets, and that the Court of Appeals, although not apparently concerned by the seizure of petitioner's assets, did not recognize the admitted assumption of petitioner's liabilities. If there was ever a case of an unwarranted windfall, it is in this case, and the beneficiary is not petitioner, but the revolutionary government.

APPENDIX A

SUPPLEMENT TO RULE 28.1 LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES

As stated in Appendix G to the Petition for Certiorari, The Chase Manhattan Bank, N.A. is 100% owned by The Chase Manhattan Corporation. The following is a list as of June 30, 1982 of additions to the list of affiliated companies of The Chase Manhattan Corporation as of December 31, 1981 as set forth in Appendix G to the Petition for Certiorari:

Alliance-Pibete Unit Trust

Anne Street Corp.

Canudos Limited

Centennial Projects Pty. Ltd.

Chase Bank International—Atlanta

Chase Econometrics/Interactive Data Corp.

Chase Finanziaria, S.P.A.

Chase Manhattan Bank (U.S.A.) National Association

Chase Manhattan Bank Oy

Chase Manhattan Capital Markets Corporation

Chase Manhattan Capital Markets (Holdings), Inc.

Chase Manhattan Government Securities Inc.

Chase Manhattan Leasing Canada, Ltd.

Chase Manhattan of California, Thrift Corporation

Chase Manhattan of Utah

Coombabah Square Center Pty. Ltd.

Credit Guarantee Corporation—Malaysia Berhad

Crystal Rivers Properties, Inc.

Dinant Limited

Fomento E Desarrollo del Norte, S.A.

G & G Developments Pty. Ltd.

Greenlake Shopping Center, Inc.
HoCo of Greenlake, Inc.
Hull 1993 Pty., Ltd.
Inter-Americas Assessoria Financiera Limitada
Jever Limited
Kendale Acres West of Miami, Inc.
Koru Limited
LaCosta Land Company, Inc.
Layang Limited
Leasing Nominees Ltd.
Libra Bank (Cayman) Ltd.
Libra Bank International, S.A.
Lindfield Shopping Centre Pty. Ltd.
Mantova Limited
Nederlandse Credietbank (Overseas) N.V.
Overseas Realty Corporation of Panama, Inc.
Petako Pty. Ltd.
Shona Limited
Tava Limited
Trans Tasman Limited
Westport Nominees Limited
Yarraluma Land Trust
Zermatt

Respondent's Reply Brief

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FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-1591

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Petitioner,

vs.

VISHIPCO LINES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE MOTION BY THE CLEARING HOUSE ASSOCIATION OF NEW YORK FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

ARTHUR M. BOAL
Counsel for Respondents Vishipco Line, et al.
Suite 8909
One World Trade Center
New York, New York 10048
(212) 775-0930

Of Counsel:

ARTHUR M. BOAL, JR.
Boal, Doti & Larsen
Suite 8909
One World Trade Center
New York, New York 10048

April 9, 1982

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Statement of Facts

The Clearing House Association of New York Association petitions this Court for leave to file a brief as amicus curiae. The clearing house has no involvement in the issues of this case other than derivatively through its members such as the petitioner. It thus does not offer this court a point of view other than a repeat of the contentions of the petitioner.

The Clearing House ignores the basic facts that the Chase branch in Saigon was not separately incorporated, that Chase represented to its customers that "The Chase Manhattan Bank, N.A." was present in Saigon. No member of the clearing house should be alarmed by the consequences of doing business in that form, when the remedy of separate incorporation and refraining from representation of presence is so apparent.

The Clearing House, on page 8 of the brief, makes the following claim:

> "Chase merely suspended the branch's office operations in the face of indisputable force majeure; the offices could have been reopened and business conducted immediaely after the authorities made it possible for Chase employees to return or had they chosen so to conduct its affairs themselves after confiscation. Certainly Vietnam had jurisdiction to cause the branch to pay its depositors, i.e., 'to enforce or collect' the obligations of the branch; the evacuation of Chase's employees was of no jurisdictional consequence."

The petitioner, Chase, made no such contention in either the District or the Circuit Court. To the contrary, statements of counsel as well as testimony elicited by Chase from the officer in charge represented that the branch was closed on April 24, 1975, not that operations were merely suspended. Counsel for the petitioner, Chase, stated in the District Court as follows:

> Ms. Lichstein: The plaintiffs have challenged the decision to close the branch on the 24th. (A-184)
> • • •

• • •

And on direct examination of the branch officer, Ralph White, Ms. Lichstein asked:

> "Q. Did you play any role, Mr. White, in the decision to close the branch?" (A-185)

And on the following cross examination the testimony was:

> "Q. In your last statement, Mr. White, I understand the decision was made in Hong Kong to close the branch.
>
> A. The authority came from Hong Kong to myself and to Mr. Cuong Vu * * *
>
> Q. On what day did you close your doors?
>
> A. I believe it was on the 24th * * *" (A-185-6)

ARGUMENT

With the closing by Chase of the Saigon branch on April 24, 1975, the only situs of its obligations to depositors was in New York.

After noon on April 24, 1975 the petitioner, Chase, was no longer present in Saigon. The situs of the petitioner's debts to the respondent depositors was where the petitioner could be found, New York.

The theory that the cause of action sprung from Saigon back to New York when the Saigon branch was closed was in Mr. Heininger's article and was not the language of the Court of Appeals. Specifically the opinion states:

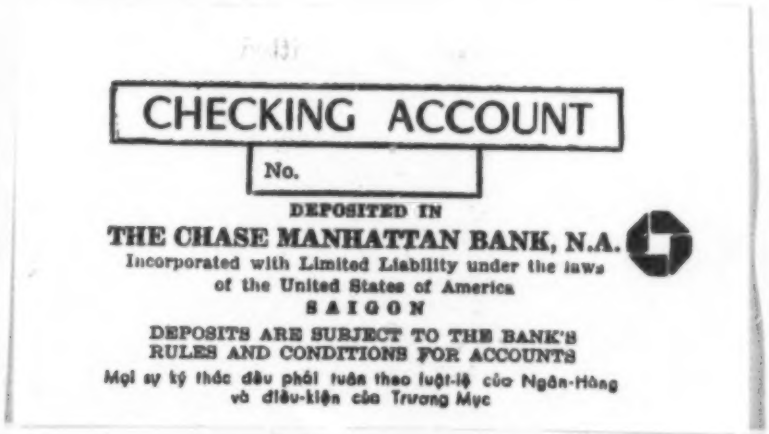
> More importantly, however, upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree. As we have said in the past, "(f) or purposes of the

> act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it.

The liability to the respondents was, and is, that of the petitioner, The Chase Manhattan Bank, N.A.; enforceable where it can be found. The chairman of the Federal Reserve Board in an opinion delivered to the National Banks was as follows:

> "A foreign branch established by a national bank is not an independent corporation, and the creditors of the branch are general creditors of the parent bank." (Federal Reserve Bulletin, 1917, p. 198)

The deposit slips used by the Chase surely indicate that it was the debtor.


CHECKING ACCOUNT

No.

DEPOSITED IN

THE CHASE MANHATTAN BANK, N.A.

Incorporated with Limited Liability under the laws of the United States of America

SAIGON

DEPOSITS ARE SUBJECT TO THE BANK'S RULES AND CONDITIONS FOR ACCOUNTS

Mọi sự tỷ thác đều phải tuân theo luật-lệ của Ngân-Hàng và điều-kiện của Trương Mục

The Court of Appeals applied Federal Law in determining whether or not the Act of State Doctrine applied in this case. It's decision is in accordance with the decision of this Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), and *Tabacalera Severiano Jorge* v.

Standard Cigar Co., 392 F.2d 706 (5th Cir., 1968), Cert. Den. 393 U.S. 924 (1968).

The only application of New York Law was in the Court's ruling that since this was a diversity case, New York Law was to be applied in determining the date of converting piastres into dollars. The decision of the Court of Appeals on that point was in accordance with the decision of this Court in *Hicks* v. *Guiness*, 269 U.S. 71, 46 S. Ct. 46 (1925), the facts of the two cases are quite similar.

CONCLUSION

It is respectfully submitted that the motion of the Clearing House Association of New York for leave to file a brief as Amicus Curiae be denied.

Respectfully submitted,

ARTHUR M. BOAL
Counsel for Respondents Vishipco Line, et al.
Suite 8909
One World Trade Center
New York, New York 10048
(212) 775-0930

Of Counsel:

ARTHUR M. BOAL, JR.
Boal, Doti & Larsen
Suite 8909
One World Trade Center
New York, New York 10048

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ARTHUR M. BOAL
Counsel for Respondents Vishipco Line, et al.
Suite 8909
One World Trade Center
New York, New York 10048
(212) 775-0930

Of Counsel:

ARTHUR M. BOAL, JR.
Boal, Doti & Larsen
Suite 8909
One World Trade Center
New York, New York 10048

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Statement of Facts

Until April 24, 1975, the petitioner, The Chase Manhattan Bank, N.A., was present and doing business through an office in Saigon, Vietnam. The office was not a subsidiary, was not separately incorporated. Its name, and no one else's appeared on the deposit slips, bank books and other business documents. The Chase Manhattan Bank, N.A., was the debtor of the depositors. These simple un-

contested facts are ignored in the motion by The Federal Reserve Bank for leave to file a brief as amicus curiae, but are nonetheless dispositive of its claimed concern with regard to the impact of the decision of the Circuit Court upon the banking industry. No cogent reason has been presented why the banking industry should be so favored as to be treated as if its branch offices were separately incorporated without doing so; to be able to solicit business as if it were a single entity, but to dishonor its liabilities as if they belonged to another corporation.

The Federal Reserve Bank on page 2 of its brief makes the following statement:

> "Operations of the Saigon branch were suspended at noon on April 24, 1975, and immediately thereafter, employees of the branch left Vietnam. When the branch suspended operations, branch officers deposited with the French embassy in Saigon the combinations and keys to the locks of the vaults of the branch and a set of the branch records. No assets of the branch were removed from South Vietnam. On May 1, 1975, the new government nationalized the branch and expropriated all of its assets".

That statement is clearly erroneous, and contradicted by the position taken by the petitioner, Chase, in the District and Circuit Courts. Statements of counsel as well as testimony elicited from the officer in charge were that the branch was *closed* on orders transmitted from Chase offices in Hong Kong.

> Ms. Lichstein: The plaintiffs have challenged the decision to close the branch on the 24th. (A-184)

• • •

Q. In your last statement, Mr. White, I understand the decision was made in Hong Kong to close the branch.

A. The authority came from Hong Kong to myself and to Mr. Cuong Vu. Whether the decision was made by Mr. Terminjin or his supervisors, I honestly don't know. . . .

Q. On what day did you close your doors?

A. I believe it was on the 24th. Let me see. Yes, at noon of the 24th. (A-185-6)

Chase has admitted at all times that the bank was closed on noon of the 24th of April and all of its employees were evacuated. The Court of Appeals dealt with every defense raised by the Chase. There is nothing in the opinion of the Court of Appeals dealing with any claim of suspension because no such claim was made by Chase.

ARGUMENT

The situs of the respondents' claims against the Chase was in New York before and after the closing of the Saigon Branch.

The situs of a debt is where the debtor can be found. This has conclusively been determined by the case of *Standard Cigar Co.* v. *Tabacalera Severiano Jorge, S.A.*, 376 U.S. 780, (1964).

The Court of Appeals held the situs of the debt was at the place where it could be enforced and that place was the location of the debtor.

The concept of the cause of action springing back from Saigon to New York is in an article by Mr. Heininger, not a statement of the Court. The Court stated:

> "More importantly, however, upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree."

The claims of the depositors always had a situs in New York. Chase in New York was liable for all of the obligations of it's branches.

The Chairman of the Federal Reserve Board has advised the National Banks as follows:

> A foreign branch established by a national bank is not an independent corporation, and the creditors of the branch are general creditors of the parent bank. (Federal Reserve Bulletin, 1917, p. 198)

In the *First National Bank of Boston* v. *Banco Nacional de Cuba*, 658 F.2d 895, 900 (2nd Cir., 1981), the statement is quoted with approval.

After April 24, 1975 the only place where the depositors could enforce their rights against the Chase was in New York. Even if the rights had been suspended they were not be enforceable in Vietnam.

The Act of State Doctrine is a Limited One

This court has stated that the act of state doctrine applies to the acts of a recognized foreign government. It is a limitation upon the principal of international law that private property cannot be seized without the payment of just compensation. The Circuit Court properly found the doctrine inapplicable to the facts of the present case. The seizure by the unrecognized insurgent forces of the petitioner's abandoned Saigon assets did not op-

erate to relieve the petitioner of its obligations to its depositors. That holding is entirely consistent with the act of State doctrine as delimited by this Court.

CONCLUSION

It is respectfully submitted that the Motion of the Federal Reserve Bank to submit a brief as Amicus Curiae should be denied.

Respectfully submitted,

ARTHUR M. BOAL
Counsel for Respondents Vishipco Line, et al.
Suite 8909
One World Trade Center
New York, New York 10048
(212) 775-0930

Of Counsel:

ARTHUR M. BOAL, JR.
Boal, Doti & Larsen
Suite 8909
One World Trade Center
New York, New York 10048

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